

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

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4 In the Matter of: Case No. 12-12020-mg

5 RESIDENTIAL CAPITAL, LLC, et al.,

6 Debtors.

7 - - - - -x

8 In the Matter of: Case No. 12-12019-mg

9 RESIDENTIAL CAPITAL FUNDING COMPANY, LLC, et al.,

10 Debtors.

11 - - - - -x

12 BURNETT,

13 Plaintiff,

14 -against- Adv. Proc. No. 12-02049-mg

15 GMAC MORTGAGE, LLC,

16 Defendant.

17 - - - - -x

18 WILLIAMS,

19 Plaintiff,

20 -against- Adv. Proc. No. 12-01896-mg

21 GMAC MORTGAGE, LLC,

22 Defendant.

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2 VAN WAGNER,

3 Plaintiff,

4 -against- Adv. Proc. No. 12-01913-mg

5 RESIDENTIAL FUNDING COMPANY, LLC, ET, AL.,

6 Defendants.

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8 JENKINS, ET AL.,

9 Plaintiffs,

10 -against- Adv. Proc. No. 12-01935-mg

11 RESIDENTIAL FUNDING COMPANY, LLC, ET, AL.,

12 Defendants.

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16 United States Bankruptcy Court

17 One Bowling Green

18 New York, New York

19 January 29, 2013

20 10:11 AM

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23 B E F O R E:

24 HON. MARTIN GLENN

25 U.S. BANKRUPTCY JUDGE

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Adversary proceeding: 12-02049-mg Burnett v. GMAC MORTGAGE,
LLC Adjourned Pre-trial Conference

Adversary proceeding: 12-01935-mg Jenkins et al v. Residential
Funding Company, LLC et al. (CC: Doc no. 1)
Pre-trial Conference

Adversary proceeding: 12-01896-mg Williams v. GMAC Mortgage LLC
(Successor by Merger to GMAC Mor
(CC: Doc no. 1) Adjourned Pre-trial Conference.

(CC: Doc# 7) Motion for Dismissal of Adversary Proceeding
Pursuant to Bankruptcy Rule 7012(b)(5) and (b)(6) Or, in the
Alternative, Permissive Abstention Pursuant to 28 U.S.C.
Section 1334(c)(1) (related document(s)3)

12-12020-mg Residential Capital, LLC Ch. 11
Adversary proceeding: 12-01913-mg Van Wagner v. Residential
Funding Company, LLC, et, al., et al.
(CC: Doc no. 1) Pretrial Conference.

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Adversary proceeding: 12-01913-mg Van Wagner v. Residential
Funding Company, LLC, et, al., et al.

(CC: Doc no 7, 9) Motion for Dismissal of Adversary Proceeding
Pursuant to Bankruptcy Rule 7012(b) and FRCP 12(b)(5), and (6)
Or, in the Alternative, Permissive Abstention Pursuant to 28
U.S.C. Section 1334(c)(1).

(CC: Doc# 10) Motion to Dismiss Adversary Proceeding
12-12020-mg Residential Capital, LLC Ch. 11
(CC: Doc# 2255) Motion to Dismiss Case filed by Kiyam J.
Poulson.

Adversary proceeding: 12-01913-mg Van Wagner v. Residential
Funding Company, LLC, et, al., et al.
(CC: Doc# 15) Motion to Dismiss Case

(CC: Doc no. 20) Motion to Dismiss Case filed by David A.
Abrams on behalf of Peter T. Demasters, Flaherty, Sesabaugh,
Bonasso PLLC, Susan Romain.

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12-12020-mg Residential Capital, LLC Ch. 11
(CC: Doc# 2630) Debtors Motion for Order Under 11 U.S.C. 105(a)
and 365(a), Fed. R. Bankr. P. 6006 and 9014 and Local
Bankruptcy Rule 6006-1 Authorizing Assumption and Assignment of
Executory Contract. Certificate of No Objection has Been
Filed.

Doc# 2687 Motion to Assume Leases or Executory Contracts /
Debtors Second Motion for Order Under 11 U.S.C. 105(a) and
365(a) and (f), Fed. R. Bankr. P. 6006 and 9014 and Local
Bankruptcy Rule 6006-1 Authorizing Assumption and Assignment of
Executory Contracts In Connection with the Sale of the Debtors
Platform Assets

Doc# 2688 Motion to Assume Leases or Executory Contracts /
Debtors Motion for Order Under 11 U.S.C. 105(a) and 365(a) and
(f), Fed. R. Bankr. P. 6006 and 9014 and Local Bankruptcy Rule
6006-1 Authorizing Assumption and Assignment of Executory
Contracts In Connection with the Sale of the Debtors Platform
Assets or the Sale of the Debtors Whole Loan Assets

(CC: Doc# 1536, 1541) Adjourned Hearing Motion for Relief from
Stay Filed on behalf of Kenneth L. Kral and Lisa A. Stricker.

1 (CC: Doc# 2153, 2154, 2157) Motion for Relief from Stay.

2

3 (CC: Doc# 2546) Motion for Relief from Stay as it applies to
4 the real property commonly known as 234 Milton Avenue, West
5 Haven, CT 06516.

6

7 Doc# 2686 Motion to Assume Leases or Executory Contracts/
8 Debtors First Motion for Order Under 11 U.S.C. 105(a) and
9 365(a) and (f), Fed. R. Bankr. P. 6006 and 9014 and Local
10 Bankruptcy Rule 6006-1 Authorizing Assumption and Assignment of
11 Executory Contracts In Connection with the Sale of the Debtors
12 Platform Assets

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14 Adj. Hearing Re: Cure Objections. (Related Document no. 61)

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16 (Doc no. 1649) Hearing Re: Cure Objection of Digital Lewisville
17 LLC to: (I) Debtors Motion for Orders: (A)(I) Authorizing and
18 Approving Sale Procedures, Including Break-Up Fee and Expense
19 Reimbursement; (II) Scheduling Bid Deadline and Sale Hearing;
20 etc.

21

22 (CC: Doc no. 1979) Adjourned Hearing RE: Objection of Wells
23 Fargo Bank, N.A. to Debtors Sale Motion [Docket No. 1979]

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1 (CC: Doc no. 2069) Adjourned Hearing RE: Limited Objection of
2 Ally Financial Inc. and Ally Bank to the Debtors Proposed
3 Platform Sale Motion [Docket No. 2069]
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ALSO PRESENT: (TELEPHONICALLY)

MARION JENKINS, Pro Se

RICH RODE, Pro Se

CONRAD P. BURNETT, Pro Se

1 P R O C E E D I N G S

2 THE COURT: Please be seated.

3 All right. We're here in Residential Capital, number
4 12-12020. There's also some adversary proceedings; I'll call
5 out those numbers when we get to them.

6 MR. GOREN: Thank you, Your Honor. Todd Goren,
7 Morrison & Foerster, on behalf of the debtors. I thought we'd
8 start off with another brief update on where we stand with the
9 sale.

10 THE COURT: Okay.

11 MR. GOREN: There's been some movement since we were
12 last here, so I just wanted to keep you up to date.

13 First, as I'm sure you saw, we reached a resolution
14 with Fannie Mae on their cure claim, and they've now consented
15 to the transfer of the debtors' Fannie Mae servicing rights to
16 Green Tree, which is the servicing platform of Walter
17 Investment Management, one of the parties to the APA.

18 Yesterday was the objection deadline, and we received
19 no objections. We did receive one informal comment from
20 Wilmington Trust on this DIP, which was just -- the stipulation
21 provides that the debtors will pay the cure claim; Wilmington
22 Trust just wanted us to clarify that it will be GMAC Mortgage
23 who is the party to the --

24 THE COURT: The counter-party to the contract?

25 MR. GOREN: -- the counter-party to the contract

1 that's receiving all of the payment that will also be making
2 the cure claim.

3 THE COURT: Okay.

4 MR. GOREN: That resolution was subject to approval by
5 the debtors' board of directors as well as Fannie's board of
6 directors and the FHFA, Fannie and Freddie's conservator. All
7 of those parties have now approved it.

8 So as a result -- well, just to take a step back, as
9 you may recall under the APA, Ocwen, who was our counter-party
10 in the APA, had the right to assign certain of its rights under
11 the APA, namely the right to purchase the Fannie assets and the
12 origination and capital market functions of the debtors to
13 Walter Investment Management. As a result of the resolution
14 with Fannie, we think we're now ready to close that portion of
15 the platform sale.

16 There are a few issues still remaining with Ocwen,
17 which I'll get to in a minute, but we think we're close to
18 resolution on. But as a result of the resolution with Fannie,
19 we think what we're now in a position to do is close both the
20 Berkshire Hathaway transaction and the Walter portion of the
21 platform sale. So there will, effectively, two different
22 closings on the 31st, for the assets, and then the Fannie Mae
23 servicing and origination and capital markets functions will be
24 transferred on January 31st.

25 THE COURT: Whoever's on the phone, you have to put

1 your phone on mute, because we're picking up some additional
2 noise. If it continues, you'll have to be cut off.

3 So go ahead, Mr. Goren.

4 MR. GOREN: Okay. The combination of these two
5 transactions on the 31st will allow us to pay down about 400
6 million of the Barclays DIP facility, to repay the Ally DIP
7 facility, and to repay the city MSR facility, and bring in
8 hundreds of millions of additional dollars into the estate.

9 With respect to Ocwen, the primary open point is the
10 approval of Freddie Mac for the servicing transfer of their
11 assets. And I'm pleased to report that, based on discussions
12 with Freddie Mac, the debtors believe we now have an agreement
13 in principle with Freddie for the resolution of their cure
14 claims and servicing transfer to Ocwen. That resolution is
15 still subject to documentation and the approval of the debtors'
16 board, as well as Freddie's board and the FHFA, but we believe
17 we are there, in principle, at this point, with Freddie.
18 So assuming all those deals get appropriately finalized, and
19 the mountains of other piles of work that my corporate
20 colleagues are working on gets appropriately documented, we
21 believe we'll be in a position to close the Ocwen portion of
22 the platform sale on February 15th.

23 So that's where we stand with the sale, unless you
24 have any questions, Your Honor.

25 THE COURT: No, I don't. Go ahead.

1 MR. GOREN: I will now turn it over to my colleague,
2 Norm Rosenbaum, who will be handling some of the adversary
3 proceedings.

4 THE COURT: Okay.

5 MR. ROSENBAUM: Good morning, Your Honor --

6 THE COURT: Hang on.

7 MR. ROSENBAUM: -- Norm Rosenbaum.

8 THE COURT: Whoever is on the phone, you're either
9 touching the phone with papers or otherwise; we're picking up
10 background noise. Put your phone on mute or you will be cut
11 off.

12 Go ahead, Mr. Rosenbaum.

13 MR. ROSENBAUM: Good morning, Your Honor.

14 THE COURT: I guess you didn't hear me on the phone.
15 Do we have an operator on the phone?

16 THE OPERATOR: Yes, Your Honor.

17 THE COURT: Okay. Can you tell who is making that
18 noise on the phone?

19 THE OPERATOR: I'm actually trying to locate that line
20 at this time.

21 THE COURT: Okay. You locate it, you tell me you've
22 located it, I'll give one last warning, and then they will be
23 cut off.

24 Go ahead, Mr. Rosenbaum.

25 MR. ROSENBAUM: Thank you, Your Honor. I'm actually

1 going to cede the podium to a couple of my colleagues on the
2 adversary proceedings. Before I do, I just wanted to report to
3 Your Honor that following the hearing we had on December 20th,
4 SilvermanAcampora has made substantial efforts to contact
5 several of the adversary plaintiffs, including a couple that
6 have matters and status conferences on for today, with some
7 degree of success. And there's been -- part of the problem has
8 been the lack of information that was originally provided by
9 the plaintiffs. That's something we hope we can rectify.

10 We've been sharing a draft of proposed adversary
11 procedures, that would apply to these types of proceedings,
12 with the committee and SilvermanAcampora. We're hoping to get
13 that filed a little later this week. What we'd like to put in
14 place is a process where we could have at least an initial meet
15 and confer, obtain relevant contact information from the
16 adversary plaintiffs, and then have at least an initial status
17 conference before the Court before proceeding with any
18 additional litigation.

19 THE COURT: I think that would be very helpful.

20 MR. ROSENBAUM: With that, Your Honor, I will cede the
21 podium to Mr. Newton.

22 MR. NEWTON: Good morning, Your Honor. James Newton
23 of Morrison & Foerster on behalf of the debtors.

24 The next item on the agenda in the scheduled adversary
25 proceeding matters is a pre-trial conference in the adversary

1 filed by Conrad Burnett. It's adversary proceeding number 12-
2 02049. I believe Mr. Burnett is on the phone. And I'm happy
3 to report that I believe we have reached a consensual
4 resolution of this adversary, with the help of
5 SilvermanAcampora, and Mr. Krell is here from SilvermanAcampora
6 as well. I'll turn it over to Mr. Burnett for now.

7 THE COURT: All right. Mr. Burnett?

8 MR. BURNETT: Yes, Your Honor.

9 THE COURT: Do you believe you have reached a
10 satisfactory resolution at this point? It's not --

11 MR. BURNETT: I do believe we have. We've had a good
12 conversation, and I'm ready to withdraw my complaint without
13 prejudice.

14 THE COURT: Let me hear from -- you are, I'm sorry?

15 MR. KRELL: Good morning, Your Honor. Justin Krell,
16 SilvermanAcampora, special counsel to the committee.

17 Yes, Your Honor, Mr. Burnett is correct; we've had
18 substantial conversations. Pursuant to those conversations,
19 Mr. Burnett has agreed to withdraw his adversary proceeding
20 without prejudice, and we will deal with his claim in the
21 claims process. He did file a timely proof of claim asserting
22 certain damages that he's alleging. He's provided supporting
23 documents with respect to that claim which I have already
24 forwarded on to debtors' counsel. So I made a representation
25 to Mr. Burnett that I am his direct contact. Any information

1 that he believes supports his claim he can forward to me; I'll
2 make sure that it gets to the debtors into the right hands for
3 analysis. Based on that, he's willing to withdraw without
4 prejudice, Your Honor.

5 THE COURT: Okay. So what is going to get filed in
6 court to reflect the understanding of the parties?

7 MR. KRELL: I spoke to Mr. Burnett about that. If
8 Your Honor so wants, we could provide Mr. Burnett with a
9 stipulation or voluntary dismissal without prejudice. I have
10 Mr. Burnett's contact information; I can send it to him and we
11 can file it with the Court, Your Honor.

12 THE COURT: All right. Mr. Burnett, is that
13 satisfactory with you?

14 MR. BURNETT: Yes, it is.

15 THE COURT: All right. Let's proceed that way. I'm
16 glad you were able to work this out. Thank you very much.

17 MR. KRELL: Thank you, Your Honor.

18 MR. BURNETT: Thank you for your help.

19 THE COURT: Thank you, Mr. Burnett.

20 MR. NEWTON: Mr. Burnett, can you hold on?

21 Your Honor, before we move on to the next matter, I
22 just wanted to bring to the Court's attention, Mr. Burnett had
23 filed two proofs of claim. Attached to one of his proofs of
24 claim appears to be a relief from stay motion seeking relief
25 from the stay to proceed with this adversary proceeding. In

1 light of the resolution, I think that should be moot, but I
2 just wanted to give --

3 THE COURT: Okay.

4 MR. NEWTON: -- Mr. Burnett a chance in case --

5 THE COURT: Well, is there anything you want to say
6 about that? I think with what happened, you ought to try and
7 reflect the full agreement in the stipulation that you'll
8 present to the Court. If there continue to be any issues, you
9 can raise it at the next hearing. Okay?

10 MR. NEWTON: Will do, Your Honor.

11 THE COURT: Is that satisfactory, Mr. Burnett?

12 MR. BURNETT: Yes, it is. I'll work with Mr. Krell on
13 all issues.

14 THE COURT: Okay. Thank you very much. I appreciate
15 it.

16 MR. BURNETT: Thank you.

17 MR. KRELL: Thank you, Your Honor.

18 THE COURT: And Mr. Burnett, you're certainly excused.
19 You don't have to remain on the line.

20 MR. BURNETT: Thank you.

21 MR. NEWTON: Your Honor, the next matter on the agenda
22 is a pre-trial conference in an adversary proceeding initiated
23 by Marion L. And Sharon Jenkins. This is adversary proceeding
24 number 12-01935. This is an adversary proceeding filed by the
25 Jenkins --

1 THE COURT: Whoever is on the phone that is resulting
2 in all of the background noise -- Operator, have you identified
3 who it is?

4 THE OPERATOR: And it's actually coming from Ms.
5 Jenkins' line.

6 MR. JENKINS: I just muted the phone. This is Mr.
7 Marion Jenkins, Your Honor. I just took my phone off of mute.

8 THE COURT: Okay. All right. You've just got to be
9 careful about brushing against it because we pick up a lot of
10 noise in the court.

11 Okay, go ahead.

12 MR. NEWTON: Your Honor, this is an adversary
13 proceeding filed by the Jenkins, naming nine defendants: RFC;
14 Mortgage Lenders Network; and Emax Financial Group, who appear
15 to be the prior holders of the Jenkins note. And as I'll get
16 into a little bit, RFC is also the master servicer of the
17 Jenkins loan. They also named Michele Morales and Judy Faber,
18 current former employees of Emax Financial and RFC,
19 respectively, who appear to have signed assignments on the
20 Jenkins note. U.S. Bank N.A., as trustee, who is the current
21 holder of the note, and America's Servicing Company, who acts
22 as primary servicer. And their counsel's here in court as
23 well. And then Shapiro and Swertfeger -- Jack L. Swertfeger,
24 Jr. and Gerald M. Shapiro, who I understand act as counsel to
25 ASC and U.S. Bank in the Georgia foreclosure of the Jenkins

1 home. And finally, MERS is named as a defendant as well.

2 As a further note, the Jenkins have also filed a proof
3 of claim in the case against RFC for two million dollars.

4 THE COURT: Mr. Jenkins, if you continue to brush
5 against the phone and we get a lot of background noise, you're
6 going to get cut off. So step back from the telephone.

7 Go ahead, Mr. Newton.

8 MR. JENKINS: Yes, sir.

9 MR. NEWTON: Just by way of a short background, as far
10 as the debtors were able to ascertain from the complaint, the
11 Jenkins appear to assert that they received a mortgage from
12 Mortgage Lenders Network. There were two assignments.
13 Eventually the mortgage note ended up with U.S. Bank. At some
14 point, a corrective assignment of the security deed was also
15 filed, assigning the mortgage to U.S. Bank as trustee.

16 ASC never notified the Jenkins of assignment, but
17 instead provided misleading information regarding the loan and
18 ultimately commenced the foreclosure. And for purposes of the
19 attorney's named, the Shapiro firm and its attorneys failed to
20 appropriately verify the factual allegations provided in
21 connection with the foreclosure.

22 The Jenkins appear to request that the Court void the
23 security deed, enjoin the defendants from foreclosing, and
24 require the defendants to give an accounting, and finally, to
25 award the Jenkins ten million dollars in damages. However, the

1 Jenkins haven't set forth any legal causes of action in the
2 complaint, and therefore, RFC is unable to determine what
3 claims are being brought against it.

4 One reason the debtors are concerned with this -- with
5 the Jenkins' failure to include the cause of action is because
6 RFC doesn't own the loan, is not the primary servicer of the
7 loan. Instead, the loan, as I mentioned, is owned by U.S.
8 Bank, serviced by Wells Fargo doing business as America's
9 Servicing Company. As a result, RFC is not involved in the
10 day-to-day servicing or the foreclosure efforts. And finally,
11 the debtors are --

12 THE COURT: Is the current servicer a sub-servicer? I
13 mean, what is the debtors' role at all.

14 MR. NEWTON: The debtor acts as master servicer. And
15 counsel for America's Servicing Company, who is the primary
16 servicer who interfaces with the borrowers and also is in
17 charge of conducting any foreclosure activities, is here as
18 well.

19 THE COURT: What's the status of the foreclosure
20 effort in the case?

21 MR. NEWTON: My understanding is the foreclosure sale
22 was scheduled, and recently, on December 31st, Mr. Jenkins
23 filed a Chapter 13 bankruptcy in the Northern District of
24 Georgia, which would postpone the foreclosure sale. And in
25 fact, on January 14th, my understanding is that the Jenkins

1 actually filed an adversary proceeding in that Chapter 13
2 proceeding in the Northern District of Georgia, which is
3 substantially similar to the adversary proceeding filed here as
4 well.

5 THE COURT: Are any of the debtors named in the
6 adversary proceeding in Georgia?

7 MR. NEWTON: Yes, RFC is named in the adversary
8 proceeding.

9 THE COURT: What judge is the bankruptcy pending in
10 front of?

11 MR. NEWTON: Just give me one second.

12 THE COURT: Mr. Jenkins, do you know who the judge who
13 has your bankruptcy case in Georgia?

14 MR. JENKINS: No, sir, I don't know his name offhand.
15 I can -- if you give me one second, I'm trying to look here.

16 Your Honor, if I may, may I speak?

17 THE COURT: I'll give you a chance in a minute.

18 Mr. Friedman, do you know?

19 MR. FRIEDMAN: It's Judge Paul Bonapfel, B-O-N-A-P-F-
20 E-L. The case number is 12-82018-pwb.

21 THE COURT: Just give me the number one more time, 12-
22 82018?

23 MR. FRIEDMAN: Sorry, Your Honor. It's in the
24 Northern District of Georgia, Atlanta, 12-82018-pwb, Paul W.
25 Bonapfel.

1 THE COURT: Okay. Mr. Newton, anything you want to
2 add at this point? So which one of the debtors is the master
3 servicer?

4 MR. NEWTON: Residential Funding Company is the master
5 servicer.

6 MR. JENKINS: I'm sorry, sir. I have the judge's
7 name. It's Judge Paul W. Bonapfel, B-O-N-A-P-F-E-L.

8 THE COURT: Okay. Thank you, Mr. Jenkins.

9 MR. JENKINS: Yes, sir.

10 MR. NEWTON: The only other thing I would add is the
11 debtors did file a Rule 12(e) motion for a more definite
12 statement, scheduled to be heard on the 28th. And one of the
13 co-defendants, Judy Faber, who's an employee of the debtors,
14 also filed a motion to dismiss. And I believe counsel for Ms.
15 Faber is on the phone as well.

16 THE COURT: Okay. Counsel, do you want to be heard?

17 MS. SCHIAVO: Nicole Schiavo for U.S. Bank as trustee
18 and America's Servicing Company.

19 Just reiterating quickly that the adversary proceeding
20 that was filed in this case is nearly identical to the
21 adversary proceeding that was filed in Georgia. The claims
22 don't seem to actually relate to RFC, with the exception that
23 at some point they were the holder of the note. I think the
24 fact that they are the master servicer is extraneous to the
25 issues that are actually set forth. It's simply because the

1 note passed through their hand at some point that they appear
2 to have been named -- they're named in a single paragraph in
3 the complaint, without any allegations really being against
4 them. The allegations are predominantly against U.S. Bank as
5 trustee and America's Servicing Company. And the allegations
6 that are set forth in this complaint are nearly identical to
7 the allegations set forth in the complaints in the Georgia
8 bankruptcy.

9 THE COURT: Do you have a view whether there is
10 subject matter jurisdiction here against any of the defendants
11 other than RFC?

12 MS. SCHIAVO: My argument would be that they do not.
13 The U.S. Bank and ASC and the other defendants that are named
14 are nondebtors here, and the Jenkins are a nondebtor in this
15 district.

16 THE COURT: But that is --

17 MS. SCHIAVO: And I also --

18 THE COURT: That isn't necessarily the end of the
19 story. I guess the Second Circuit's Quigley decision is one of
20 the more recent articulations of when there is related-to
21 jurisdiction. Is there a conceivable effect on the debtors
22 from the claims against your client, for example?

23 MS. SCHIAVO: There are against my client. There are
24 claims that, while I believe are very -- can be very quickly
25 dealt with on the face of the complaint, there are claims that

1 are properly alleged, to the extent that --

2 THE COURT: No, but is there, for example -- which is
3 your client, America's Servicing?

4 MS. SCHIAVO: And U.S. Bank as trustee.

5 THE COURT: Okay. And do they have contractual
6 indemnity claims against any of the debtors? I mean, I'm
7 focusing --

8 MS. SCHIAVO: I am not aware of that.

9 THE COURT: Okay. I'm focusing now specifically on
10 whether there is subject matter jurisdiction on the claims
11 asserted against the nondebtors. The plaintiffs are not before
12 me as debtors, other than RFC. The defendants are not debtors.
13 In order to find related-to jurisdiction, there would have to
14 be conceivable effect on the race of the estate. From looking
15 at the complaint I don't see it, but I wanted to know what your
16 position would be on that.

17 MS. SCHIAVO: I'm in agreement with Your Honor that I
18 don't see any --

19 THE COURT: Whether or not the complaint could survive
20 a 12(b)(6) motion, the issue is can it survive a 12(b)(1)
21 motion with respect to the defendants other than the debtor.
22 And as to the debtor, while jurisdiction might exist, the issue
23 of whether the complaint states a claim is a separate issue.
24 So what's your intention, Ms. Schiavo, as to how you plan to
25 proceed?

1 MS. SCHIAVO: If Your Honor would like to maintain
2 this action in this court we, first off, have not been served,
3 so there's that concern. And then obviously the jurisdiction
4 and venue arguments are a concern as well. And I believe that
5 in just looking at the exhibits that are annexed to the
6 complaint, if we even got to the merits, they could -- they're
7 very easily disposed of as well.

8 THE COURT: Okay. Mr. Jenkins, have you served any of
9 the defendants with the complaint?

10 MR. JENKINS: Yes, sir. I served all the defendants
11 via registered mail receipt, Your Honor. And thank you for
12 allowing me to speak.

13 And Your Honor, if you look at the main document that
14 gives U.S. Bank permission to have my mortgage, it is -- and I
15 put on the record -- the note Michele Morales supposedly signed
16 is a forgery. You, and anyone there at the court, may look at
17 that note right now and see that it was copied. Her signature
18 is copied on allonge that tran -- gave Residential Funding the
19 note to U.S. Bank, so therefore, that's what I alleged in my
20 complaint.

21 Now, I don't know the attorney's name that just spoke
22 right now, but if she was doing -- if she could look at that
23 and she can see herself that that was put on a copy machine and
24 her signature was put there and it picked up everything that
25 was copied. It copied her name and everything that was there.

1 That's what transferred -- that was what gave U.S. Bank
2 permission to have my mortgage. So if that allonge note is a
3 fraudulent document, therefore U.S. Bank does not have
4 permission, nor America's Servicing Center, to foreclose on me.

5 THE COURT: Okay. The bankruptcy court is a court of
6 limited jurisdiction. You need to establish a basis for
7 subject matter jurisdiction and personal jurisdiction as to
8 every defendant that you name in the complaint.

9 MR. JENKINS: Yes.

10 THE COURT: For pers --

11 MR. JENKINS: We -- I --

12 THE COURT: Hold on just a second. Just a second, Mr.
13 Jenkins. Just bear with me a second; I want to look at
14 something.

15 Okay. I'm looking at the docket in this case, Mr.
16 Jenkins. There is a certificate of service that was filed on
17 November 9th, 2012, and it's signed by Sharon Jenkins. I take
18 it -- is that your wife, Mr. Jenkins?

19 MR. JENKINS: That's correct, sir.

20 THE COURT: Okay. And it has a box checked for
21 certified mail on insured depository institution by sending the
22 process by certified mail addressed to the following officer of
23 the defendant at -- and then it has no information below it.
24 So the Bankruptcy Rules and the rules of this court require
25 that you file a certificate of service showing that each

1 defendant was served, when, how. Okay?

2 The only -- by looking at the docket, the only
3 certificate of service I've seen, and it's filed on our docket
4 as -- ECF is the electronic case filing system -- it's docket
5 number 4. We assign numbers to each pleading that's filed. So
6 for example, your complaint is number 1, and number 4 is a
7 certificate of service. I don't see any other certificate of
8 service. So I don't see any proof of service that each of the
9 defendants named in the complaint has been served.

10 Additionally, the summons, which is a document that's
11 issued by the bankruptcy court, which you have to serve with
12 the complaint, was issued on November 14th, 2012. Federal Rule
13 of Bankruptcy Procedure 7004 requires that you serve the
14 summons within fourteen days after it's issued. So if the
15 summons wasn't served within the fourteen days, the rules
16 require that a second summons issue from the clerk's office and
17 it be served within fourteen days.

18 I know these rules may seem technical, but they are
19 the rules that are set out in the Federal Rules of Bankruptcy
20 Procedure and have to be followed. So unless -- if a defendant
21 asserts that it wasn't properly served with the summons and
22 complaint, they can certainly move to dismiss on those grounds.
23 They don't have to, but they can. It's ordinarily fairly easy
24 to serve an adversary proceeding in bankruptcy because the
25 rules allow service by First-Class Mail. But nevertheless, the

1 rules have to be followed. So at this stage I'm raising it
2 now, because this is the pre-trial -- the first pre-trial
3 conference in the case, Mr. Jenkins. There's no indication
4 that your complaint was properly served.

5 But let me go beyond that and raise some other
6 questions with you. You may or you may not have claims against
7 some or all of the defendants. The only one of the defendants
8 that you've named -- excuse me just a second; I need to pull up
9 another pleading.

10 Okay. The only one of the debtors that you've named
11 as a defendant is Residential Funding, LLC. The Court would
12 have subject matter jurisdiction over claims against
13 Residential Funding, but it is not at all clear that the Court
14 would have subject matter jurisdiction on any claims you may
15 have against any of the other defendants that are not debtors
16 here.

17 So each of those defendants -- if you decide that you
18 want to proceed in this court against them, each of those
19 defendants may well move to dismiss the case for lack of
20 subject matter jurisdiction. I couldn't tell, from reading
21 your complaint, whether there was any possible basis for
22 subject matter jurisdiction against any of the defendants other
23 than Residential Funding.

24 Your complaint alleges, as a basis for jurisdiction,
25 28 U.S.C., Section 1334, which is the section of the United

1 States Code that would provide a bankruptcy court with
2 jurisdiction, but it's not over every defendant in every case.

3 Mr. Friedman, has your firm at all tried to
4 communicate with the Jenkins?

5 MR. FRIEDMAN: We have, Your Honor. For the record,
6 Ronald Friedman from SilvermanAcampora.

7 My office spoke with Mr. Jenkins' wife Sharon on
8 January 9th. At that time, Ms. Jenkins has indicated that they
9 were hopeful to try and resolve the suit if they could work
10 towards a loan modification, making it clear in the
11 conversation, from Ms. Jenkins' perspective, that her main goal
12 was the preservation of her home.

13 We thereafter contacted the Jenkins and left a message
14 on January 18th, January 22nd and January 24th, in an effort to
15 have some of the colloquy that Your Honor has just had now to
16 prepare for the conference, and we unfortunately did not hear
17 back from them.

18 With respect to this case, it is beneficial we at
19 least had a phone number and we were able to reach out and
20 contact, as opposed to some of the others that we'll discuss
21 today we were only able to communicate via writing and
22 overnight mail and certified mailings to try and communicate.
23 But we did have some discussion on January the 9th; thereafter
24 we were unable to receive a return call to address some of the
25 issues.

1 And certainly we are aware of the Chapter 13 that was
2 filed on December 31st of 2012 that's pending in the Northern
3 District of Georgia. And I believe that our last look at the
4 docket, within the last twenty-four hours, was that the Chapter
5 13 Trustee, who had been appointed, Ms. Mary Ida Townson, had
6 filed a motion to dismiss that Chapter 13 case on procedural
7 grounds. But certainly we think that there may be a couple of
8 alternatives to try and bring this matter to conclusion,
9 although we are aware that, unlike some of the other cases,
10 this matter, the Chapter 13 was filed on the eve of the
11 foreclosure, so they are fairly well developed on that process.

12 THE COURT: Are any of the other defendants
13 represented by counsel in the courtroom?

14 Any other counsel on the telephone?

15 MR. HAWKINS: Your Honor, this is Chris Hawkins from
16 Bradley, Arant, Boult & Cummings; I represent Judy Faber.

17 THE COURT: And you filed a motion to dismiss already?

18 MR. HAWKINS: Yes, Your Honor, a 12(b)(6) motion.

19 THE COURT: And is that already calendered to be
20 heard?

21 MR. HAWKINS: Not that I'm aware of, Your Honor.

22 THE COURT: Okay. All right. Here's what I would
23 like to do, since this is the first pre-trial conference. I'm
24 going to adjourn the pre-trial conference to the next regularly
25 scheduled ResCap date, which is February 7th.

1 And Mr. Jenkins, it's really quite important that you
2 speak with Mr. Friedman from SilvermanAcampora or one of his
3 colleagues. They've indicated you or your wife had one
4 conversation with them, and they tried to reach out to you on a
5 number of other occasions. You ought to speak with them, and
6 before you decide how to proceed -- I mean, when we get to the
7 February 7th date, I'm going to -- I don't want any more
8 motions to dismiss before then. Okay? At that hearing, if
9 there isn't any agreement -- voluntary agreement to dismiss
10 some of the defendants, for example, I'm going to set a
11 deadline for motions to dismiss, and we'll proceed with that.
12 When I set that schedule, Mr. Jenkins, I'll give the defendants
13 two or three weeks to file their motions, and I'll set a
14 deadline for you to respond to the motions.

15 You ought to speak again -- Mr. Friedman's firm,
16 SilvermanAcampora, is special counsel to the creditors'
17 committee for borrower issues, and while he doesn't represent
18 you, his firm doesn't represent you, special counsel was
19 appointed to sort of facilitate communication with people such
20 as yourself with borrower-related issues.

21 If we have to move forward with motions to dismiss,
22 we'll do that. I mean, I'll tell you, from looking at the
23 complaint, even though I generally provide some leeway for
24 plaintiffs not represented by counsel, I think your complaint
25 is woefully deficient in stating any causes of action against

1 any of the defendants. Your biggest problem you're going to
2 face immediately is with respect to the defendants other than
3 Residential Funding. Residential Funding, at least, you may
4 not have stated a claim; the Court would have subject matter
5 jurisdiction. What I would do is -- we'd have to wait and see,
6 but as to the other defendants, you're going to have, I
7 suspect, a real fight on your hands when they -- I'm assuming
8 they'll move to dismiss for lack of subject matter
9 jurisdiction. Okay.

10 So Mr. Newton (sic), will you communicate with Mr.
11 Friedman and his colleagues? They'll try and reach out to you,
12 but you need to talk to them. I'll find out on February 7th
13 whether you did. Don't duck their calls. Okay, I can't be any
14 clearer about it. Mr. Newton (sic), anything you want to add?

15 MR. NEWTON: That's Mr. Jenkins.

16 THE COURT: I'm sorry. Mr. Jenkins, I apologize.

17 Mr. Jenkins, anything you want to add?

18 MR. JENKINS: No, sir. I'll be in contact with Mr.
19 Newton as soon as possible.

20 THE COURT: Okay, or with Mr. Friedman and his firm.
21 One of them will be in touch with you.

22 Ms. Schiavo, anything you wanted to add?

23 No. So hold off on filing any motions. Let's --
24 hopefully it'll be a shorter conference on February 7th, but if
25 there is no resolution as to some or all of the defendants, at

1 that point I'll set a briefing schedule and you can all have at
2 it.

3 MS. SCHIAVO: Thank you, Your Honor.

4 THE COURT: Okay. Mr. Newton, is there anything you
5 wanted to add?

6 MR. NEWTON: No, thank you. Thank you, Your Honor.

7 THE COURT: Mr. Friedman, is there anything you wanted
8 to say?

9 MR. FRIEDMAN: Not on this matter, Your Honor.

10 THE COURT: Okay. All right. Thank you very much.
11 Thank you, Mr. Jenkins.

12 MR. JENKINS: Thank you, sir.

13 THE COURT: And you're certainly excused. You don't
14 have to stay on the phone.

15 All right. Mr. Newton, what's next?

16 MR. NEWTON: Now, Your Honor, I'll turn the podium
17 over to my colleague Erica Richards.

18 MS. RICHARDS: Good morning, Your Honor. Erica
19 Richards of Morrison & Foerster, appearing on behalf of the
20 debtors.

21 The next matter on the agenda relates to the adversary
22 proceeding initiated by Todd Williams. He's, I understand, a
23 pro se plaintiff under case number 12-01896.

24 THE COURT: Let me find my notes, okay?

25 Go ahead.

1 MS. RICHARDS: Your Honor, there are two items in this
2 case scheduled today. There's a pre-trial conference
3 scheduled, and also the debtors have filed a motion to dismiss,
4 or in the alternative, seeking abstention. I don't know if you
5 have a preference as to which we take first, and I'm not sure
6 if Mr. Williams is on the phone.

7 THE COURT: Mr. Williams, are you on the phone?

8 Is anyone for Mr. Williams on the phone? Anyone in
9 the court?

10 Just bear with me a second, Ms. Richards.

11 Go ahead in any order you wish.

12 MS. RICHARDS: Your Honor, I think I'll give you a
13 little background on the case then. So Mr. Williams commenced
14 the adversary proceeding on September 28th. The defendants or
15 debtors, GMAC Mortgage, LLC, and Homecoming Financial, LLC and
16 nondebtor MERS. We don't represent MERS in this matter, and I
17 don't know if they've been served with a complaint and summons.
18 To date, they have not appeared or filed anything in the case.

19 Mr. Williams appears to be asserting a single cause of
20 action to set aside the foreclosure sale of his property by
21 GMAC Mortgage's servicer. That sale took place on September
22 4th, and the deed of foreclosure was recorded on November 14th.

23 THE COURT: It was recorded?

24 MS. RICHARDS: It was recorded, yes.

25 As directed by the Court on the hearing on December

1 20th, I understand SilvermanAcampora has attempted to reach out
2 to Mr. Williams. They can certainly provide more details on
3 their efforts. Unfortunately, we only have a mailing address
4 for Mr. Williams. I understand they sent letters. They've
5 obtained --

6 THE COURT: There was no good address in any of his
7 seven prior bankruptcies?

8 MR. FRIEDMAN: No telephone number, Your Honor. We
9 sent an overnight letter on January the 15th.

10 Again, Ronald Friedman from SilvermanAcampora.

11 The overnight letter requested the plaintiff to
12 contact us regarding this adversary proceeding. We have a
13 delivery receipt that shows it was delivered on January the
14 16th. We have not received any response. Mr. Williams has
15 filed seven Chapter 13 bankruptcies in Georgia to stop the
16 foreclosure. On the sixth bankruptcy, GMAC received relief
17 from the stay to continue the foreclosure. And the seventh
18 bankruptcy was recently dismissed sua sponte by the court.
19 We've had no contact with Mr. Williams and he hasn't responded
20 to our letter.

21 THE COURT: Thank you, Mr. Friedman.

22 Go ahead, Ms. Richards.

23 MS. RICHARDS: With that, Your Honor, I think I'll
24 take up our motion to dismiss or abstain. By way of --

25 THE COURT: I guess I don't understand why you've

1 moved to abstain. I mean, do you really want him going
2 somewhere else? I mean, every time somebody tries to lift the
3 stay to proceed with a lawsuit somewhere else, you oppose it.
4 And now on several of these, in the alternative, you've moved
5 for me to abstain so that somebody can go somewhere else to
6 litigate. I mean --

7 MS. RICHARDS: Your Honor, I think it's our position
8 that to the extent he's actually seeking to defend the
9 foreclosure, he can already proceed with that under the
10 supplemental servicing order that Your Honor has already
11 entered in his home court, and that's where he should seek to
12 do it, if he indeed has valid claims.

13 THE COURT: The property was sold already. I mean --

14 MS. RICHARDS: The property was already sold. I
15 understand under Georgia state law he can bring a cause of
16 action for rescission of the foreclosure, so there's that. I'm
17 not suggesting he should do that, or that, of course, that we
18 wouldn't oppose it or seek to dismiss it on other grounds,
19 but --

20 THE COURT: Yeah, I mean, do you really want to go
21 fight him in another court? I mean, tell me if that's what you
22 want.

23 MS. RICHARDS: If you're willing to --

24 THE COURT: Well, I don't know what I'm --

25 MS. RICHARDS: -- dismiss, Your Honor --

1 THE COURT: I'm not saying what I'm going to do, but
2 when you ask -- be careful what you ask for --

3 MS. RICHARDS: Understood.

4 THE COURT: -- because you might get it.

5 MS. RICHARDS: Your Honor --

6 THE COURT: I'd get rid of the case, but then, you
7 know --

8 MS. RICHARDS: Your Honor, we do think there are
9 certainly plenty of grounds, both procedural and substantive,
10 for dismissal of the matter before Your Honor today.

11 THE COURT: So why don't you argue that?

12 MS. RICHARDS: Okay. As an initial matter, we think
13 Mr. Williams' service is deficient and warrants dismissal under
14 Rule 12(b)(5). There was no affidavit of service --

15 THE COURT: You know, there's a --

16 MS. RICHARDS: -- filed.

17 THE COURT: -- Second Circuit case, Montalbano v.
18 Easco Hand Tools, Inc., 766 F.2d 737, 740 (2d Cir.1985), and I
19 think it's a reasonably well-established proposition that where
20 a party makes a 12(b)(5) motion to dismiss for insufficient
21 service, the Court has the option of dismissing the case or
22 quashing service and not dismissing the case. I mean, let's
23 face it, the easiest -- in bankruptcy, because service can be
24 by First-Class Mail, all they've got to do is address it to the
25 debtors. I mean, okay, he failed to -- he didn't file an

1 affidavit of service. You've put in evidence that you weren't
2 served. Clearly, service is insufficient. You really want me
3 to just dismiss the case for failure to serve the complaint?

4 MS. RICHARDS: Your Honor, we're comfortable that
5 there are other grounds warranting dismissal. We raise it
6 because obviously if we don't raise it we waive this objection.
7 So --

8 THE COURT: But at least in the Second Circuit, I
9 wouldn't have to dismiss it for insufficient service. I could
10 quash their service, but there's nothing to quash; it was never
11 served. But let's deal with the 12(b)(6) motion, okay?

12 MS. RICHARDS: Okay, Your Honor. So turning to the
13 12(b)(6) arguments, the debtors contend that Mr. Williams
14 failed to state relief -- pardon me.

15 THE COURT: Failure to state a cause of action, okay?

16 MS. RICHARDS: Yes. Mr. Williams' complaint is
17 premised on allegations that GMAC Mortgage's interest in the
18 property is invalid. We think those claims are barred under
19 the doctrines of waiver and laches. As Mr. Friedman already
20 explained to the Court, Mr. Williams is a serial bankruptcy
21 filer. He's filed seven bankruptcy cases in the last six
22 years; the last was dismissed sua sponte by the bankruptcy
23 court under 109(g).

24 At no time did Mr. Williams assert that GMAC Mortgage
25 did not have standing to foreclose. Foreclosure proceedings

1 were actually initially commenced by the debtors in 2007, which
2 is when Mr. Williams began filing these bankruptcy cases. At
3 no time did he seek to file an action in Georgia state court
4 otherwise enjoining or defending the foreclosure. He had
5 access to appropriate legal means to defend the foreclosure and
6 ample opportunity to do so; he didn't. The time to bring those
7 claims is well past. And on that basis, Your Honor, we think
8 dismissal of the complaint is warranted.

9 THE COURT: Anything else you want to add?

10 MS. RICHARDS: Not at this time, Your Honor, unless
11 you have any questions.

12 THE COURT: Well, what's happened with the other
13 def -- have you had any communication with the other
14 defendants? He's got a long list of defendants.

15 MS. RICHARDS: Williams is -- Williams, I think,
16 actually has a fairly short list of defendants.

17 THE COURT: Well, he's got Bank of New York Mellon
18 Trust.

19 MS. RICHARDS: I think those parties were all GMAC
20 Mortgage's --

21 THE COURT: JPMorgan --

22 MS. RICHARDS: -- that's in interest to them.

23 THE COURT: -- well --

24 MS. RICHARDS: We have no knowledge --

25 THE COURT: Oh, I see --

1 MS. RICHARDS: -- that those parties have been served.

2 THE COURT: -- GMAC Mortgage, as servicer for, so GMAC
3 Mortgage is the only defendant?

4 MS. RICHARDS: GMAC Mortgage and Homecoming Financial
5 are all he -- and MERS are the only parties he actually names.

6 (Pause)

7 THE COURT: So if I grant the debtors' motion to
8 dismiss, what happens to the claim against MERS? I mean,
9 you're not the only defendant in the case. I'm just -- I'm
10 really trying to be very practical about what happens here.

11 MS. RICHARDS: Your Honor, as I think I mentioned
12 before, I don't know if MERS has been served. We don't
13 represent MERS.

14 THE COURT: I don't think anybody's been served.

15 MS. RICHARDS: So I will also mention, Mr. Williams
16 has filed proofs of claim in the bankruptcy case against the
17 debtors.

18 THE COURT: All right. Pending before the Court is
19 the debtors' motion for dismissal of the adversary proceeding
20 pursuant to Bankruptcy Rule 7012(b)(5) and (b)(6), or in the
21 alternative, permissive abstention pursuant to 28 U.S.C.
22 1334(c)(1). That's ECF docket number 3.

23 In the motion, GMAC and debtor and debtor-in-
24 possession seeks to dismiss the adversary proceeding, commenced
25 by pro se plaintiff Todd A. Williams, for insufficient service

1 of process and failure to state a claim upon which relief can
2 be granted, or in the alternative, requesting that the Court
3 exercises its discretion to abstain from exercising
4 jurisdiction of the adversary proceeding.

5 In support of its motion, GMAC Mortgage submits the
6 declaration of Jennifer Scoliard, dated November 12, 2012.
7 It's ECF docket number 3, Exhibit A.

8 The plaintiff filed a response to the debtors' motion
9 to dismiss. That's ECF docket number 11.

10 The Court grants the debtors' motion to dismiss for
11 insufficient service under 12(b)(5) and failure to state a
12 claim under 12(b)(6). I won't recount the history that's set
13 forth in the papers, other than the reference already made to
14 the fact that Mr. Williams is a serial bankruptcy filer, having
15 filed seven bankruptcy petitions in the Northern District of
16 Georgia. His sixth bankruptcy case was dismissed on August 17,
17 2012, pursuant to Section 109(g) of the Bankruptcy Code,
18 precluding Williams from filing another bankruptcy for 180 days
19 after entry of the dismissal order. Notwithstanding Williams'
20 statutory ineligibility for bankruptcy protection, on September
21 4, 2012 he filed a seventh petition in case number 12-72201.
22 That petition was dismissed sua sponte. In dismissing the
23 seventh petition, the bankruptcy court also ordered that: "the
24 filing of the seventh case did not give rise to the automatic
25 stay so that any foreclosure sale that took place after the

1 filing of the petition in the present case is valid to the
2 extent otherwise valid under state law."

3 On September 4th, that same day, the foreclosure sale
4 took place and the property was sold.

5 On September 28, 2012, Williams filed his adversary
6 complaint in this case. The summons and notice of pre-trial
7 conference was issued on October 2, 2012. As of today's date,
8 the plaintiff has not filed an affidavit of service of the
9 complaint and summons, and GMAC Mortgage asserts it has no
10 record of being served, either directly or through its counsel
11 or registered agent.

12 The complaint recites a fairly incomprehensible group
13 of allegations with things such as alleged robo-signing,
14 fraudulent assignment of note, lack of permission to sell the
15 property, rescission of the foreclosure sale. In his response
16 that he filed, Mr. Williams said that GMAC moves to dismiss the
17 complaint "on the basis that the plaintiff failed to allege
18 sufficient facts to support his preference, avoidance and
19 fraudulent transfer claims." I don't know where he got that
20 from. Those were new and unsupported allegations, not in the
21 complaint.

22 With respect to 12(b)(5), there is no affidavit of
23 service that's been filed. The defendant has come forward with
24 evidence that it was never served with the complaint. And
25 clearly, 12(b)(5) provides a basis for dismissing the

1 complaint, although the law in the Second Circuit would give
2 the court the discretion whether to simply serve this and not
3 dismiss the complaint, but I choose to dismiss the complaint.

4 With respect to 12(b)(6), Rule 8(a)(2) requires the
5 complaint to contain a short and plain statement of the claim
6 showing that the pleader is entitled to relief.

7 And to survive a motion to dismiss under Rule
8 12(b)(6), a complaint must contain sufficient factual matter,
9 accepted as true, to state a claim to relief that is plausible
10 on its face. That's the Iqbal case, 129 S. Ct. 1937, 1949
11 (2009).

12 The Court draws all reasonable inferences in favor of
13 the nonmoving party, and I'm more solicitous of the complaint
14 filed by a pro se party, as is the case here.

15 The Court uses a two-prong approach when it's
16 considering a motion to dismiss. First, the Court must accept
17 all factual allegations in the complaint as true, discounting
18 legal conclusions clothed in factual garb. Second, the Court
19 must determine if these well-pleaded factual allegations state
20 a plausible claim for relief. And plausibility determination
21 is not done in a vacuum; it's a context-specific task that
22 requires the reviewing court to draw on its judicial experience
23 and common sense.

24 I've applied all of those standards here, and this
25 complaint simply fails to state a claim for relief. Therefore,

1 the defendant's motion to dismiss is granted. The order should
2 provide that for the reasons stated on the record during the
3 hearing the motion to dismiss is granted under 12(b)(5) and
4 12(b)(6).

5 MS. RICHARDS: Thank you, Your Honor.

6 Moving on, the next matter on the agenda is the
7 adversary proceeding filed by George V. (sic) Wagner, case
8 number --

9 THE COURT: Van Wagner.

10 MS. RICHARDS: Van Wagner, yes. It's case number 12-
11 01913. Your Honor, we understand Mr. Van Wagner is pro se, and
12 as we advised your chambers yesterday, we have reason to
13 believe his is incarcerated. We do not know if he's appearing
14 telephonically. I don't know if you're able to --

15 THE COURT: Mr. Van Wagner, are you on the telephone?

16 What is the basis for your belief that he's
17 incarcerated?

18 MS. RICHARDS: Your Honor, SilvermanAcampora has
19 attempted to reach out. I will let them give you a little
20 background --

21 THE COURT: Okay.

22 MS. RICHARDS: -- on the information they've obtained.

23 MR. FRIEDMAN: Your Honor, on January -- Ronald
24 Friedman from SilvermanAcampora. On January 15th, 2013, our
25 office sent an overnight letter to Mr. Van Wagner requesting

1 that he contact our firm regarding the adversary proceeding.
2 We then, a week thereafter, sent a certified return receipt in
3 First-Class Mail to Mr. Van Wagner at the P.O. box address that
4 we were able to locate for him. We then --

5 THE COURT: Is that a prison address?

6 MR. FRIEDMAN: I believe that the P.O. box is not a
7 prison address. We received an e-mail yesterday directed to my
8 office, at 11:41, regarding George Van Wagner. It had
9 regarding the case number, the main ResCap case number of 12-
10 12020.

11 And I'll read the letter -- the e-mail: "Dear sir, I
12 am writing upon request to inform you that due to unforeseen
13 circumstances, Mr. George Van Wagner is unable to communicate
14 with anyone at this time. I am sure he will contact you to
15 discuss any pending matters, or designate someone to do so on
16 his behalf, as soon as he is able. I apologize for the lack of
17 information provided. However, we do not have permission to
18 convey anything additional. Correspondence can be sent and
19 will be received and held for Mr. Van Wagner at the address you
20 have on file, the P.O. box in Martinsburg, West Virginia." And
21 then it just says "Thanks", with no signature or other frame of
22 reference. The basis --

23 MR. ARTHUR: Your Honor, this is Chris Arthur. I can
24 give a more definitive answer on this. The circuit court of
25 Berkeley County, West Virginia held a hearing in late November.

1 The circuit judge confirmed that Mr. Van Wagner was
2 incarcerated, and that's why he was unable to appear at the
3 hearing. I don't know the charges, and I didn't inquire, but
4 as of end of November he definitely was incarcerated.

5 THE COURT: I'm sorry, may I ask who you are?

6 MR. ARTHUR: I'm sorry, sir. It's Chris Arthur on
7 behalf of Seneca Trustees.

8 THE COURT: Okay. Thank you.

9 Anything else, Mr. Friedman? Mr. Friedman, anything
10 else?

11 MR. FRIEDMAN: Just to note, we did a search on a
12 docket, and it looked like he was still incarcerated, based on
13 a docket online on January 10th of 2013. So we believe that to
14 be the case, based on the best available information we have,
15 Your Honor, which you now have as well.

16 THE COURT: Thank you.

17 Ms. Richards?

18 MS. RICHARDS: So, firstly, I understand the Court
19 wants to proceed in --

20 THE COURT: I do.

21 MS. RICHARDS: -- his absence. Okay. Your Honor,
22 today is scheduled, again, as both a pre-trial conference in
23 the case; in addition, the debtors had filed a motion to
24 dismiss, and we understand three groups of other named
25 defendants have also filed their own motions to dismiss. In

1 addition, several defendants filed a joint answer.

2 Again, I guess we'll take the pre-trial conference
3 first, unless you want to --

4 THE COURT: No --

5 MS. RICHARDS: -- dive into the motions to dismiss?

6 THE COURT: -- let's deal with the motion to dismiss.

7 MS. RICHARDS: Okay.

8 THE COURT: Let me just sort of get to the point. Mr.
9 Van Wagner is a debtor in a bankruptcy case pending in the
10 Northern District of West Virginia, case number 08-00435. It
11 was originally filed as a Chapter 11, converted to a Chapter 7.
12 I looked at the docket this morning, it's 111 pages long. The
13 case remains open. Many of the issues that Mr. Van Wagner
14 raises in this case have been raised in bankruptcy court, state
15 court, federal district court, and now here.

16 Let me ask, this does have the long list of
17 defendants, Residential Funding, being the lead defendant, but
18 the other eleven defendants are not debtors in this court.
19 When I read the complaint, I don't understand what causes of
20 action Mr. Van Wagner is purporting to allege against which
21 defendants because he doesn't make that clear. And I realize
22 you represent the debtor and not -- and we have some lawyers on
23 the phone, I guess, for nondebtor defendants. Is there subject
24 matter jurisdiction as to the nondebtor defendants? These are
25 all state -- well, I guess they're not all state law causes of

1 action. I guess he purports to allege, perhaps, some federal
2 statutory claims. But I don't see the basis for 1334
3 jurisdiction.

4 I should also say that the complaint alleges, as the
5 basis for jurisdiction, 1332, diversity of citizenship
6 jurisdiction. There are nondiver -- in any event, there -- I
7 guess his case in federal district court was already dismissed
8 for lack of jurisdiction, because there are nondiverse
9 defendants that are named. So I mean, the only basis for the
10 nondebtor defendants to be here would be 1334. But I didn't
11 see anything that would show the conceivable effect on the race
12 of the debtors' estate from claims that had preceded when the
13 debtor became the servicer of the loan.

14 But let me hear from -- do we have counsel for any of
15 the other moving parties on the phone or in the court? Come on
16 up.

17 MR. ABRAMS: Good morning, Judge.

18 MR. ARTHUR: Chris Arthur appearing for --

19 THE COURT: Let -- we have one in the courtroom, and
20 then I'll let you speak from the phone, okay?

21 All right, go ahead.

22 MR. ABRAMS: Good morning, Judge. David Abrams,
23 Strongin Rothman & Abrams, here on behalf of the law firm
24 Flaherty, Sesabaugh & Bonasso, as well as attorneys Peter
25 DeMasters and Susan Romain who are partners in that law firm.

1 THE COURT: Okay.

2 MR. ABRAMS: We have moved to dismiss, essentially, on
3 failure to state a claim grounds. There are no allegations
4 whatsoever in the complaint.

5 THE COURT: But what I've got to deal with first is,
6 is there subject matter jurisdiction? The first thing I have
7 to decide is whether there's subject matter jurisdiction.

8 MR. ABRAMS: Your Honor, I would tell you no, except
9 that there's insufficient factual allegations in the complaint
10 for our clients to even know what the claims are. So other
11 than being listed as parties involved and the law firm being
12 listed as counsel to PNC, who's the successor, as alleged, just
13 in the "parties involved" section, to National City, there is
14 not a single allegation in the complaint. So while I would
15 like to tell you there's no subject matter jurisdiction in the
16 case, the fact of the matter is there's no allegations at all.
17 I will tell you --

18 THE COURT: But he certainly hasn't alleged a basis
19 for subject matter jurisdiction.

20 MR. ABRAMS: That is correct, Your Honor.

21 THE COURT: Okay. I mean, in order for me to get to
22 the 12(b)(6) motion, I first have to conclude that I have
23 subject matter jurisdiction, or at least there's a colorable
24 basis for concluding there's subject matter jurisdiction. As
25 to the clients you represent, I didn't see it in the complaint.

1 MR. ABRAMS: Your Honor is correct; there are no
2 allegations --

3 THE COURT: Okay.

4 MR. ABRAMS: -- upon which this Court could exercise
5 subject matter jurisdiction.

6 THE COURT: All right. Let me -- when we get to the
7 12(b)(6) I'll listen to you further, okay?

8 Anybody else on the phone that wants to be heard?

9 MR. AMOS: Your Honor, Timothy Amos for Tim Amos
10 and Golden & Amos, PLLC in West Virginia.

11 THE COURT: Go ahead.

12 MR. AMOS: Your Honor, it's basically the same
13 argument. The subject property is in West Virginia, the
14 plaintiffs live in West Virginia, the vast majority of the
15 defendants are in West Virginia. There is no subject matter
16 jurisdiction --

17 THE COURT: Well, but that doesn't --

18 MR. AMOS: -- and there's been no allegation --

19 THE COURT: What you just said doesn't connect, okay?
20 The property can be in West Virginia, the defendants can be in
21 West Virginia, but that doesn't tell me whether there's a basis
22 for subject matter jurisdiction under 1334. There could be
23 subject matter jurisdiction, there could be failure to state a
24 claim, lots of other things, but in your view, sir, is there a
25 basis for subject matter jurisdiction against your clients?

1 MR. AMOS: No, Your Honor.

2 THE COURT: Okay. Anything else you want to add?

3 MR. AMOS: No, sir.

4 MR. ARTHUR: Your Honor, this is Chris Arthur, if I
5 may, on behalf of Seneca Trustees.

6 THE COURT: Yes.

7 MR. ARTHUR: It goes a little bit further than just
8 subject matter jurisdiction. Mr. Van Wagner has filed these
9 types of suits in at least three other courts including the
10 bankruptcy court in the State of West Virginia. So our
11 position also is this lawsuit is barred as it relates to Mr.
12 Van Wagner.

13 THE COURT: It may be --

14 MR. ARTHUR: I also would assert --

15 THE COURT: Stop.

16 MR. ARTHUR: -- related to the -- excuse me.

17 THE COURT: Stop. It may be barred against him if I
18 ever got to the merits, but the first inquiry is is there
19 subject matter jurisdiction. Is it your view --

20 MR. ARTHUR: Yes, I'd like to add -- relay to the
21 Court, at least allegations against my client relate to state
22 law, whether or not we can proceed with foreclosure in the
23 State of West Virginia under the laws of West Virginia. So I
24 don't think there's core -- this is a core proceeding and this
25 particular court has jurisdiction.

1 THE COURT: Anybody else for any of the other
2 defendants? Ms. Richards, is there a basis for subject matter
3 jurisdiction against any of the defendants other than
4 Residential Funding?

5 MS. RICHARDS: Not that the debtors are aware of, Your
6 Honor.

7 THE COURT: You're not aware that there is conceivable
8 effect on the race of the estate regarding any purported claims
9 asserted in this document against the nondebtors?

10 MS. RICHARDS: Not that I'm aware of, Your Honor. I
11 will say I can't speak to whether there may be some
12 indemnification obligations to the extent any of these parties
13 were agents of the debtors, but I -- we got a --

14 THE COURT: Can't hear you. You're got -- your
15 trail -- your voice is trailing off.

16 MS. RICHARDS: I don't want -- I don't know the
17 answer, but at this point I'm unaware of any basis.

18 THE COURT: All right. So go on with your argument on
19 the 12(b) -- there would be subject matter jurisdiction against
20 the debtor. So let me hear your argument on dismissal as to
21 the claims against the debtor.

22 MS. RICHARDS: Your Honor, the arguments for dismissal
23 are under 12(b)(6). Mr. Van Wagner has failed to state a claim
24 upon which relief can be granted. His complaint lacks any
25 factual allegations that will support any cause of action.

1 THE COURT: All right. Anybody else want to be heard?

2 All right. With respect to the motions to dismiss
3 that the Van Wagner adversary complaint and it's adversary
4 proceeding 12-01913, Mr. Van Wagner was a borrower under a
5 mortgage loan originated by Shenandoah Mortgage, LLC as of
6 October 30, 2006. The loan was evidenced by a note in the
7 amount of 240,000 dollars which was secured by real property
8 located at 409 Three Run Road, Bunker Hill, West Virginia 25413
9 pursuant to a security deed executed at the same time as the
10 note.

11 Shenandoah signed the security deed on December 6th,
12 2006 to National City Mortgage Co. On December 8, 2006,
13 National City assigned the security deed to mortgage to MERS.
14 The note as an allonge showing an endorsement from Shenandoah
15 to National City and National City an endor -- with an
16 endorsement in blank.

17 On July 11, 2007, plaintiff allegedly conveyed the
18 property to VAC, LLC, an entity formed and managed by plaintiff
19 subject to the note.

20 I won't go through the entire history of VAC but in
21 Mr. Van Wagner's bankruptcy case in the Northern District of
22 West Virginia, the transfer -- his transfer of the property to
23 VAC, LLC was set aside as a fraudulent conveyance and the
24 property was reconveyed to Mr. Van Wagner.

25 Again, I won't go through the entire history of --

1 it's a 111-page docket including two trips to the Fourth -- to
2 the district court, to the Fourth Circuit, each time affirming
3 decisions adverse to Mr. Van Wagner.

4 On or about February 1, 2009, GMAC replaced National
5 City as loan servicer and notified plaintiff of the transfer on
6 February 4th, 2009 and GMAC again notified plaintiff of the
7 transfer in a letter dated February 6th, 2009 which directed
8 that all payments effective February 1, 2009 be sent to GMAC.
9 Plaintiff acknowledged in his complaint that he ceased making
10 payments on the loan after receiving the notice of transfer.

11 With respect to all of the defendants other than
12 Residential Funding -- and that's National City Mortgage,
13 Golden & Amos, PLLC, Tim Amos, GMAC Mortgage -- well, GMAC
14 Mortgage, I'll leave aside -- Peter DeMasters, Flaherty,
15 Sesabaugh, Bonasso, PLLC, Susan Romain, PNC Bank National
16 Association, Seneca Trustees, Inc., Jason Manning and Troutman
17 Sanders, LLP. So with everybody except Residential Funding and
18 GMAC Mortgage, the Court dismisses the complaint for lack of
19 subject matter jurisdiction.

20 Complaint alleges diversity jurisdiction is the basis
21 for jurisdiction here. Clearly, there is no diversity
22 jurisdiction. First, his action in the district -- federal
23 district court against all of the same defendants was dismissed
24 by the district court and that dismissal was affirmed by the
25 Fourth Circuit for lack of subject matter jurisdiction. The

1 only basis for subject matter jurisdiction here would be 1334,
2 and as to the nondebtor defendants, there does not appear to
3 be -- there's certainly no basis alleged for 1334 jurisdiction
4 as to the nondebtor defendants. There is no allegation that
5 would support any conceivable effect on the debtors' estate by
6 virtue of the claims against the nondebtors.

7 With respect to the debtors --

8 (Pause)

9 THE COURT: -- there is a certificate of service on
10 the docket from Mr. Van Wagner. It's ECF docket number 5, and
11 it shows service by mail -- first class mail on Residential
12 Funding, LLC, 8400 Normandale Boulevard, Suite 250,
13 Minneapolis, Minnesota 55437. It also shows service by mail on
14 other defendants but I've already dismissed the case as to the
15 other defendants for lack of subject matter jurisdiction.

16 With respect to Residential Funding, debtors argue
17 that there is insufficient service of process and that the case
18 be dismissed under 12(b)(5). And they allege that rather than
19 Suite 250, it should be Suite 350. I find that this is not a
20 material shortcoming in service and, therefore -- and the
21 debtors have, obviously, received a copy of the complaint. So
22 there was substantial compliance with the service requirements
23 with respect to Residential Funding. So I deny the motion to
24 dismiss on 12(b)(5) grounds.

25 With respect to failure to stay the claim under

1 12(b)(6), a complaint must set out only enough facts to state a
2 claim for relief as plausible on its face. See Vaughn v.
3 Airline Pilots Association 604 F.3d 703, 709, (2nd Cir. 2010)
4 citing the Apollo case, 129 S.Ct. 1937, 1949 (2009), where
5 complaint pleads facts that are merely consistent with
6 defendant's liability and stop short of the line between
7 possibility and plausibility of entitlement to relief.
8 Plausibility is not akin to a probability requirement but
9 rather requires more than a sheer possibility that the
10 defendant has acted unlawfully.

11 The courts use a two-prong approach when considering a
12 motion to dismiss. First, the court must accept all factual
13 allegations in the complaint as true, discounting legal
14 conclusions clothed in factual garb. Second, the court must
15 determine if these well-pleaded factual allegations state a
16 plausible claim for relief. The plausibility of determination
17 is not made in a vacuum; it is a context specific task that
18 requires a reviewing court to draw on its traditional
19 experience and common sense.

20 The claim is plausible when the factual allegations
21 permit the court to draw the reasonable inference that the
22 defendant is liable for misconduct alleged. A complaint that
23 only pleads facts that are merely consistent with the
24 defendant's liability does not meet the plausibility
25 requirement. A pleading that offers labels and conclusions or

1 a formulaic recitation of the elements that the cause of action
2 will not do. Threadbare recitals of the elements of the cause
3 of action supported by mere conclusory statements do not
4 suffice. The pleadings must create the possibility of a right
5 to relief that is more than speculative.

6 Any fraud allegations must also satisfy Rule 9(b)
7 carried forward in Bankruptcy Rule 7009 requires that the
8 plaintiff state with particularity the circumstances
9 constituting fraud or mistake.

10 There are three elements required to plead common law
11 fraud in West Virginia. One, that the act claim to be
12 fraudulent was the act of a defendant or induced by him. Two,
13 that it was material and false. The plaintiff relied upon it
14 and was justified under the circumstances in relying upon it.
15 And three, that he was damaged because he relied upon it. See
16 *Bowens v. Allied Warehouse Housing Servicing*, 729 S.E. 2d 845,
17 851, 852, (W.Va. 2012).

18 Each fraud claim must be pled with particularity as to
19 each defendant against which plaintiff raises such claims. And
20 to the extent the Court construes a complaint to include a
21 claim for wrongful foreclosure or attempted foreclosure, West
22 Virginia state courts have recognized a cause of action for
23 legal pursuit of foreclosure. See *Lucas v. Fairbanks Capital*
24 *Corp.* 618 S.E.2d 488, 489-90 (W.Va. 2005). Lucas held that
25 under West Virginia law, creditors in a deed of trust or their

1 representatives are not required to pursue remedies that are
2 not set out in the deed of trust or in any relevant statute to
3 attempt to cure or default prior to pursuing a foreclosure
4 under West Virginia Code Section 38-1-3 which governs
5 nonjudicial foreclosure sales.

6 Now, there are substantial arguments here that both
7 res judicata and collateral estoppel further bar Mr. Van
8 Wagner's claims in light of the extensive proceedings before
9 Judge Flatley of the Bankruptcy Court in the Northern District
10 of West Virginia. It's unnecessary for me to reach those
11 issues, however.

12 The Court grants the motion, the 12(b)(6) motion to
13 dismiss. Even allowing for the leeway ordinarily given to a
14 pro se debtor, the Court concludes that the complaint simply
15 fails to state a claim for relief against the debtors.

16 The plaintiff has not alleged that he is not in
17 default on the loan or the GMAC-M caused his failure to make
18 loan payments. He asserted he stopped making payments because
19 he did not know to whom he should remit funds or that he was
20 advised to stop making payments. But the evidence attached to
21 the complaint clearly establishes that both National City and
22 GMAC clearly instructed Mr. Van Wagner where and when to make
23 the payments and it's clear he acknowledges he didn't make the
24 payments.

25 Mr. Van Wagner has also failed to allege facts that

1 would support his request for injunctive relief. West Virginia
2 courts held that an injunction of a nonjudicial foreclosure may
3 be appropriate in certain circumstances including when the
4 proper amount due and the debt is in dispute if the loan
5 secured by the deed of trust is usurious or if the public sale
6 violates the law. None of those circumstances are alleged
7 here, nor are they supported by any of the allegations made in
8 the complaint. Consequently, the debtor's motion to dismiss
9 under 12(b)(6) is granted. The order should reflect for the
10 reasons stated on the record, the complaint is dismissed under
11 12(b)(6).

12 MS. RICHARDS: Thank you, Your Honor.

13 THE COURT: Okay.

14 UNIDENTIFIED SPEAKER: Thank you, Your Honor.

15 THE COURT: And somebody in the -- I have to -- you
16 ought to -- I ought to get one order. I need an order that
17 makes clear that I've dismissed all the nondebtor defendants
18 for lack of subject matter jurisdiction. Okay.

19 MS. RICHARDS: We'll incorporate that in the same
20 order, Your Honor.

21 THE COURT: Okay. All right. What's next?

22 MS. RICHARDS: With that, Your Honor, I will cede the
23 podium to my colleague, Norm Rosenbaum.

24 THE COURT: Thank you.

25 MR. ROSENBAUM: Your Honor, Norm Rosenbaum for the

1 debtors. The next matter -- matters on are the uncontested
2 matters, IV at page 8 of the docket, Your Honor, of the agenda.

3 Just to review them, for the first matter the --

4 THE COURT: I'm sorry; what page is this on?

5 MR. ROSENBAUM: Page 8.

6 THE COURT: Okay. Go ahead.

7 MR. ROSENBAUM: Looking at document 2734 -- unless I'm
8 an agenda behind.

9 THE COURT: Anybody wish to be heard or speak? This
10 is the debtors' motion for an order under Section 105 and 365
11 authorizing assumption and assignment of the executory
12 contracts -- contract. Anybody wish to be heard?

13 All right. There was no objection. It was filed.
14 The motion's granted.

15 MR. ROSENBAUM: Your Honor, the second matter was a
16 motion filed by Wells Fargo to foreclose on a first lien. We
17 advised counsel that they were the procedures in effect and
18 advised them that they had to operate under those procedures
19 and they're in the process of doing so. And that's the
20 situation as well with the third matter.

21 THE COURT: Well, I know you say you advised them, but
22 I got two motions pending.

23 MR. ROSENBAUM: Well, the procedures provide that if a
24 party files a motion, notwithstanding the standing order that
25 Your Honor had entered to govern these procedures, if they file

1 a motion, the motion is treated as if they made the informal
2 request which does not require the filing of motions, so we're
3 treating the motion under the procedures.

4 THE COURT: All right. Does anybody wish to be heard
5 from Wells Fargo Delaware Trust Company?

6 Does anybody wish to be heard on the First Niagara
7 Bank motion for relief from stay?

8 How is it going to work now? I mean I have to enter a
9 disposition. I got two pending motions. I know you say that
10 there is an order that covers it, but I need to enter -- I
11 can't leave --

12 MR. ROSENBAUM: Your Honor --

13 THE COURT: -- I'm not going to leave an open docket.

14 MR. ROSENBAUM: -- Your Honor, we can -- we'll submit
15 an order to chambers on both matters advising that those
16 motions are subject to the standing order --

17 THE COURT: Right.

18 MR. ROSENBAUM: -- on the first lien procedures and
19 could be dealt with --

20 THE COURT: All right.

21 MR. ROSENBAUM: -- will be dealt with in that manner.

22 THE COURT: I want two orders denying the motions
23 without prejudice and indicating that they'll be dealt with
24 under the standing order. I need to deal -- we need a
25 disposition for the pending -- it isn't enough to say they'll

1 be dealt with under something else. I need to either grant,
2 deny or enter some other order with respect to these. So I'm
3 denying them without prejudice and indicate that they'll be
4 dealt with in accordance with the procedures.

5 MR. ROSENBAUM: Your Honor, we're happy to do that and
6 I don't want to waste the Court's time, and if you don't want
7 to hear this that's fine, but the order -- the order
8 specifically provides the manner in which those motions -- if
9 the parties file a motion, that's how it's handled under the
10 procedures. So we could save the Court the effort but we're
11 happy to do it.

12 THE COURT: Okay. I'm going to enter an order. If
13 you -- I'm not locked in cement about having it saying denied
14 without prejudice, but I need to enter an -- I've been
15 having -- we've been having fits in chambers trying to track
16 back to make sure there's a disposition of all pending motions.
17 Someone in your office is going to facilitate that effort by a
18 report that they're working on. So on each of these pending
19 motions, you need to submit an order that shows what the
20 disposition is. If it's -- that they will be processed in
21 accordance with whatever that prior order is, that's fine with
22 me.

23 MR. ROSENBAUM: I understand.

24 THE COURT: I just need to make sure there's an order
25 that disposes the motion. I can't leave two open motions on

1 the docket.

2 MR. ROSENBAUM: Understood, Your Honor. We'll do
3 that.

4 THE COURT: Okay.

5 MR. ROSENBAUM: All right. Your Honor, the next
6 matter is number 4 on page 9. And this was the debtors' second
7 motion for assumption and assignment of executory contracts.
8 I'll be ceding the podium to my colleague, Alexandra Barrage.

9 MS. BARRAGE: Good morning, Your Honor. Alexandra
10 Barrage, Morrison & Foerster, on behalf of the debtors.

11 Your Honor, items 4 and 5 on the agenda under IV are
12 two separate motions to request approval for assumption and
13 assignment of various executory contracts that are listed on
14 the schedules to Ocwen and to Berkshire. We received --

15 THE COURT: And the first of those motions is ECF
16 docket number 2687 and the second of them is 2689.

17 MS. BARRAGE: That's correct, Your Honor. And we
18 received no objections.

19 THE COURT: Actually, it's 2688; I'm sorry.

20 MS. BARRAGE: That's correct, Your Honor. I'm --

21 THE COURT: 2688.

22 MS. BARRAGE: 2687 --

23 THE COURT: 87 and 88 are the two.

24 MS. BARRAGE: -- and 88. And we received no
25 objections to those --

1 THE COURT: Okay. Anybody wish to be heard with
2 respect --

3 MS. BARRAGE: -- motions.

4 THE COURT: -- to those two motions?

5 All right, they're both granted.

6 MS. BARRAGE: Thank you, Your Honor.

7 All right. Your Honor, if I may, we have a request to
8 skip over V and just deal first with the cure objections under
9 VI.

10 THE COURT: Fine.

11 MS. BARRAGE: I think those are --

12 THE COURT: Fine.

13 MS. BARRAGE: -- fairly straightforward.

14 THE COURT: Okay.

15 MS. BARRAGE: I'd like to cede the podium to Mr.
16 Goren. Thank you, Your Honor.

17 MR. ENGELHARDT: Hello, Your Honor. Despite previous
18 advertisement, Stefan Engelhardt for Morrison & Foerster. I'm
19 here just to quickly brief Your Honor on the status update for
20 the Digital Lewisville lease.

21 The debtors and the landlord have successfully
22 resolved a cure claim asserted by the landlord. There is
23 pending before the Court, it's on for presentation tomorrow, a
24 stipulation resolving that claim. The parties are currently
25 working through -- resolving the objection of the landlord to

1 the assumption and assignment of the lease. And those are
2 four-party negotiations that are progressing. There is a
3 working stipulation between the debtors, Ocwen, and the
4 landlord in circulation. We hope it to be resolved this week.
5 With that, we'd like to hold this over to the next -- for the
6 next omnibus hearing.

7 THE COURT: So that's February 7th, I guess. Right?

8 MR. ENGELHARDT: February 7th.

9 THE COURT: Okay. That's fine.

10 MR. ENGELHARDT: Thank you very much, Your Honor.

11 THE COURT: Thank you.

12 MR. GOREN: Now, it's my turn again. Todd Goren,
13 Morrison & Foerster on behalf of the debtors.

14 Just wanted to give you a brief update on where we
15 stand with Wells Fargo. It was listed as going forward but we
16 managed to reach a tentative resolution with them late last
17 night which is still subject to documentation. Essentially, we
18 agreed that we would provide Wells Fargo sixty days post-
19 closing to assert any cure claims. An escrow will be
20 established in an amount of one million or less. The exact
21 amount is still being negotiated but we're comfortable it will
22 be in that range. And that's for reimbursement of unpaid
23 claims after the sixty-day period.

24 Wells has asserted that there's approximately 2.7
25 million in non-P&I advances for which they have asserted claims

1 but the debtors have not yet paid. The debtors have reviewed
2 those claims and determined that about 1.4 million is properly
3 due and payable, some of which may already have been paid in
4 the ordinary course. To the extent it hasn't already been
5 paid, it will be paid promptly in the ordinary course.

6 With respect to the balance of the last 1.3 million,
7 the issue is in many cases one of -- simply one of timing. The
8 claim asserted by Wells is not currently due and payable. The
9 debtors --

10 THE COURT: They just wanted to be sure somebody was
11 going to pay them.

12 MR. GOREN: That's basically right. And they wanted
13 some period of time post-closing to figure out that they're
14 getting paid properly. So the debtors or the purchaser, as
15 required by the sale order, will pay it post-closing and to the
16 extent any amounts remain unpaid after the sixty days, we'll
17 work with Wells to see if we can come to an agreement on what
18 that number is and look to the escrow for that or come back to
19 Your Honor if we have to.

20 Based on this resolution, Wells -- the Wells
21 agreements are being assigned to both Berkshire Hathaway and
22 Ocwen. So Wells has agreed to consent to the assumption and
23 assignment, based on this agreement on the record, on the 31st.
24 We'll hopefully get this documented in the next couple days so
25 this won't be an issue with respect to the Ocwen sale but just

1 to adjourn this matter to the February 7th hearing, just in
2 case.

3 THE COURT: Thank you, Mr. Goren.

4 MR. GOREN: And counsel for Wells is in the courtroom.

5 THE COURT: Okay. Come on up.

6 MR. ALBANESE: Good morning, Your Honor. Chris
7 Albanese, Gibbons PC on behalf of Wells Fargo Bank as servicer,
8 and we're just agreeing to what debtors said.

9 THE COURT: Thanks very much.

10 Mr. Goren.

11 MR. GOREN: I'll turn it over to my colleague, Norm
12 Rosenbaum, who will be handling the last two lift stays, I
13 believe.

14 THE COURT: Okay.

15 UNIDENTIFIED SPEAKER: Your Honor, may I be excused?

16 THE COURT: Yes.

17 MR. ROSENBAUM: Norm Rosenbaum, again, Your Honor, for
18 Morrison & Foerster.

19 Your Honor, the last two items on the agenda today are
20 the motion of Kenneth Kral and other similarly situated relief
21 from the stay. That's docket number 1536. Your Honor, this
22 matter was adjourned on consent with counsel to the Krals, and
23 a notice of adjournment was filed; an affidavit of service was
24 filed. I don't believe counsel for Mr. Kral has made an
25 appearance.

1 MR. ROBERTS: That's incorrect, Your Honor. Joseph
2 Roberts appearing --

3 MR. ROSENBAUM: Excuse me.

4 MR. ROBERTS: -- for Mr. Kral and the proposed class.

5 THE COURT: Okay.

6 MR. ROSENBAUM: I apologize. I will cede to Mr.
7 Roberts.

8 THE COURT: All right. Go ahead.

9 MR. ROBERTS: Well, Your Honor, there's a class action
10 pending against GMAC related to the filing of improperly
11 notarized documents to facilitate foreclosure. We've got two
12 similar cases pending: one against Chase and one against
13 Aurora. And we've run into subject matter jurisdiction issues
14 in federal court and those court cases are now in state court.

15 We're seeking relief so that we can pursue the cases
16 which seek purely equitable remedies; a purging, in a sense, of
17 those documents that have been filed based on these improper
18 notarizations that are documented in the OCC consent order with
19 GMAC. If we are not able to obtain relief, then these
20 documents will remain in the public record, and what they
21 create, in essence, is an evidentiary presumption under
22 California law as to the validity of the documents and they're
23 on a daily basis used against homeowners so that the debtor can
24 prevail -- and GMAC can prevail in individual foreclosure
25 defense cases, in relief of stay matters, and it creates an

1 unlevel playing field in that these documents should not carry
2 with them this presumption of validity because they were mostly
3 improperly notarized. And the remedy that we're seeking is
4 somewhat of a purging or some type of way to unpollute this
5 public record so as to relevel the playing field for
6 individuals who are either in foreclosure or in bankruptcy
7 where standing is an issue.

8 THE COURT: Anything else you want to add? Have
9 you -- you want to discuss the Sonnax factors? Do you know
10 what you --

11 MR. ROBERTS: Well, Your Honor, all I saw in terms of
12 a defense was the cost of having to potentially go through the
13 public record and purge these issues and the fact that it would
14 inhibit the ability of the debtor to reorganize. However,
15 we've heard about the progress that's been made in terms of the
16 selling of the major assets of the debtor. I don't see that we
17 can -- sure, we can say because of the cost that this remedy
18 should be completely ignored and these folks will not have the
19 ability to go forward and have their day in court, in a sense,
20 without having to battle this presumption of validity based on
21 these documents.

22 THE COURT: If I --

23 MR. ROBERTS: But something besides cost has to be
24 argued, I would think.

25 THE COURT: As I understand it, the California action

1 is in the early stages of litigation. It's not trial ready.
2 You have a bunch of other cases pending against other
3 defendants, but this case -- which court is it pending in?

4 MR. ROBERTS: They're in the -- well, this particular
5 court case is in the central district federal court and the
6 other two have now been moved over to the superior court in --
7 both in Orange County, California.

8 THE COURT: What's the basis for federal jurisdiction
9 in the federal district court action?

10 MR. ROBERTS: Well, there's none as we've learned from
11 what's happened in the other cases. Both courts in the Chase
12 and the Aurora cases have said we don't have subject matter
13 jurisdiction because this impinges on the regulator, the OCC's
14 regulatory powers. And, therefore, we're not going to reach
15 the merits, we're going to dismiss. You can take this into
16 state court. So we've refiled in state court on these other
17 two cases and we're going to have to do the same thing --

18 THE COURT: Right.

19 MR. ROBERTS: -- if we can get relief of stay and go
20 into Superior Court.

21 THE COURT: So, if --

22 MR. ROBERTS: But we don't have the issues.

23 THE COURT: All right. So basically, what you're
24 telling me is that not much has happened in the federal
25 district court, and in all likelihood if I lift the stay, the

1 federal court action is going to be dismissed and you're going
2 to have to refile the case in Los Angeles Superior Court. Is
3 that a fair summary?

4 MR. ROBERTS: That's my intention, Your Honor, based
5 on what's happened since this matter's begun and we've got the
6 rulings in the other two cases.

7 THE COURT: Okay.

8 MR. ROBERTS: We know we've got some subject matter
9 jurisdiction issues and if -- regardless of what happens here
10 today, I'll advise the court in Los Angeles that based on the
11 precedent of the other two judges, we should probably dismiss
12 the case and then move this into state court. But it's the
13 right to sue without the stay being in the way that I'm really
14 seeking today whether it is in the federal case or in the
15 subsequent state court that I expect to file.

16 THE COURT: Well, nothing stops you -- if what you're
17 seeking is equitable relief, nothing stops you from filing an
18 adversary proceeding in this court under 7001(7); if you're
19 seeking equitable relief, that's a basis for an adversary
20 proceeding here against the defendants. The question is what
21 basis have you shown for me to lift the stay to have you go off
22 initially in federal district court and you acknowledge that
23 you're going to have to dismiss that case and refile in
24 Superior Court in Los Angeles. That triggers clearly the
25 twelve-prong test that the Second Circuit Sonmax decision sets

1 forth; nonexclusive factors, not all applicable in every case.
2 Do you want to briefly address how, under the Sonnax factors,
3 you believe you're entitled to have this Court lift the stay?

4 MR. ROBERTS: Well, Your Honor, the first thing I
5 would argue would be that we're going to run into the same
6 jurisdictional problems if I file an adversary proceeding. And
7 I have to admit that I'm not familiar enough with adversary
8 proceedings to say that we're not going to run into the issue
9 of are we going to be bump -- is this Court going to be
10 restricted by the regulator's power in the same way that the
11 federal court was restricted and not have the ability to modify
12 or affect this consent order. It's part of the subject matter
13 of the underlying lawsuit.

14 THE COURT: Well, let's assume I can't -- if there's a
15 consent order and if it's valid and binding and I can't do
16 anything about it, that's the law that will apply. But if
17 that -- are you acknowledging that under the consent order that
18 you have no right to relief?

19 MR. ROBERTS: I do not. In the federal court I do
20 not. In state court, we clearly do. And that's why we're back
21 in state court. The state courts are not courts of limited
22 jurisdiction and the actions, in a sense, are having an effect
23 on the public records, they're disregarding the notary laws.
24 This is clearly the domain of a superior court.

25 The first thought was to bring it into federal court

1 because we thought there would be a better understanding of
2 these issues but Chase and Aurora both effectively raised the
3 issue of subject matter jurisdiction. And I'm just concerned
4 if I bring an adversary proceeding we're going to be arguing
5 about the same issues and we're going to end up in the same
6 place where the court's going to say, well, we don't have
7 jurisdiction because of the consent order. But there is a
8 venue out there and that would be the California Superior Court
9 that could address the issues.

10 THE COURT: All right. Mr. Rosenbaum, let me hear
11 from the debtors' counsel.

12 MR. ROSENBAUM: Thank you, Your Honor.

13 THE COURT: Would this Court have jurisdiction in an
14 adversary proceeding?

15 MR. ROSENBAUM: This Court would have jurisdiction for
16 injunctive relief, Your Honor.

17 Your Honor --

18 THE COURT: 1334 would provide the basis for
19 jurisdiction over the debtors and Rule 7001(7) is the provision
20 in the Bankruptcy Rules on bringing an adversary proceeding
21 where you're seeking equitable relief. What's the impact of
22 the OCC consent order? I guess here, it's really the Federal
23 Reserve Board consent order.

24 MR. ROSENBAUM: Your Honor, we haven't addressed the
25 merits of that in the context of this action. This is only a

1 motion for relief. We did argue in our opposition that the
2 conduct alleged in the complaint was the very same conduct that
3 was the subject of the consent order. And so in terms of
4 monitoring and correcting those wrongs, that has been addressed
5 by the consent order. This seemed, from the face of the
6 complaint, entirely duplicative of that.

7 THE COURT: So if there are improperly notarized or
8 prepared documents that have been filed in the California land
9 records, how does the consent order -- what does it require the
10 debtors to do?

11 MR. ROSENBAUM: Well, I think it would be part of the
12 review that's required of the foreclosure review and to
13 correct --

14 MR. ROBERTS: Which has just been cancelled because it
15 was ineffective.

16 THE COURT: Stop. I will allow you to speak but only
17 after Mr. Rosenbaum has completed and I've asked him my
18 questions. Don't interrupt.

19 MR. ROBERTS: I apologize, Your Honor.

20 THE COURT: Go ahead, Mr. Rosenbaum.

21 MR. ROSENBAUM: I believe what it requires, Your
22 Honor, and frankly there's other counsel here and other
23 attorneys at our firm and other firms working on this that are
24 better prepared to speak to this than I, but I believe that it
25 requires the review of the foreclosures and to the extent there

1 are things that need to be corrected are corrected in terms of
2 the robo-signing type allegations.

3 THE COURT: All right.

4 All right. Counsel, do you want to be heard further?
5 Go ahead.

6 MR. ROBERTS: Just briefly, Your Honor.

7 First of all, the consent orders do not address
8 California law and the criminal element of soliciting and
9 influencing individuals to engage in improper notarial acts.
10 That's unique to California. It's not mentioned -- there's one
11 line about notarization in the consent order.

12 Furthermore, the independent foreclosure reviews that
13 counsel refers to have just been abandoned by the OCC and the
14 Fed because of -- because of the fact that they were
15 ineffectual. They were spending too much money on the reviews,
16 and we're waiting to hear how they're going to proceed. Last
17 we heard, they're just going to simply let the banks determine
18 who's going to get funds and who's not.

19 The problem is is those borrowers that are not going
20 to be affected by the consent order as well. The consent order
21 applies to 2009, 2010, 2011 but this foreclosure crisis
22 continues and these documents are still in the public record
23 and will continue well after the consent order is over. And
24 now that California has instituted a homeowner bill of rights,
25 standing is more of a cause of action and there's going to

1 probably be more suits based on these standing issues. When an
2 individual debtor files their claim and standing is an issue,
3 or if they're in a Chapter 7 or Chapter 13 relief of stay is at
4 issue, when they challenge standing, the response of the debtor
5 is to bring in these improperly notarized assignments and rely
6 on the presumption of validity that is attached to them
7 uniquely pursuant to California law, and that is what makes the
8 playing field unlevel, in a sense. Debtors individually can't
9 overcome that presumption. So the class needs to combine its
10 resources to try to remedy the fact that these documents have
11 been put in the public record and will remain in the public
12 record as this foreclosure crisis continues.

13 THE COURT: All right. Anything else, Mr. Rosenbaum?

14 MR. ROSENBAUM: Your Honor, we set forth in our papers
15 we don't believe movant has satisfied the Sonnax factors.

16 I would also add, Your Honor, Mr. Kral himself is in a
17 debtor in his own bankruptcy proceeding. I question the
18 standing to bring these actions. He has --

19 THE COURT: Yes, but automatic stay doesn't prevent a
20 debtor in a bankruptcy from bringing an action.

21 MR. ROSENBAUM: I question the standing -- it's a
22 Chapter 7, Your Honor, and I question the standing --

23 THE COURT: Okay.

24 MR. ROSENBAUM: -- as whether -- who really has the
25 right to bring these type of --

1 THE COURT: I don't have those papers in front of me.
2 So -- all right, the Court's prepared to rule.

3 Pending before the Court is the motion for relief from
4 stay. It's filed as ECF docket number 1536 filed by Kenneth
5 Kral, Lisa Strickler (sic) and all other similarly situated
6 asking the Court to lift the automatic stay to allow their
7 California tort action to proceed. Debtors filed an objection
8 to the motion; that's ECF 1938. The motion to lift the stay is
9 denied.

10 On February 7th, 2012, Kral and Strickler (sic)
11 commenced an action against the debtors, GMAC Mortgage LLC and
12 Executive Trustee Services LLC in California Federal Court on
13 behalf of themselves and other similarly situated; caption:
14 Kenneth L. Kral v. GMAC Mortgage LLC, Civil Number
15 2:2012cv01023 GW (OPx) Central District California 2012.

16 The first amended complaint was filed on April 25th,
17 2012 and the movants allege claims were unfair -- unlawful,
18 unfair acts pursuant to California law violation of the Truth
19 in Lending Act for failing to notify borrowers of the alleged
20 assignment of their mortgages in accordance with the law. I
21 believe the case has been resolved as to Lisa Strickler (sic)
22 but no dismissals have been filed with respect to her.

23 The claims were based on GMAC's alleged improper
24 notarization practices with respect to mortgage documents, and
25 the movants allege that these claims arise in part from the

1 consent order issued by the Office of the Comptroller of the
2 Currency.

3 Movants seek an injunction to enjoin GMAC from
4 continuing its improper business practices and damages for less
5 than 500,000 dollars based on the TILA claim.

6 On September 24th, 2012, the movants filed this motion
7 seeking relief from the automatic stay. They allege that the
8 Sonnax factors weigh in their favor. They also allege that
9 Stern v. Marshall -- as a result of Stern v. Marshall, this
10 Court would lack the ability to finally adjudicate their
11 claims. That's clearly wrong. Any claims that would be
12 asserted by creditors against the estate are clearly part of
13 the claim's allowance process, and this Court would have the
14 power and authority to adjudicate those claims.

15 A bankruptcy petition initiates an automatic stay
16 against the debtors' estate including any act to obtain
17 possession of property of the estate or it would exercise
18 control of their property of the estate; see Section 362(a)(3).

19 Under Section 362(d), a creditor can request relief
20 from the stay either for cause including lack of adequate
21 protection. In determining whether cause exists to lift the
22 stay, courts consider, at least in the Second Circuit, the
23 twelve nonexclusive factors set forth by the Second Circuit in
24 Sonnax Industries, 907 F.2d 1280, 1286 (2d Cir. 1990). Not all
25 of the factors are relevant in every case and cause is a broad

1 and inflexible concept that must be determined on a case-by-
2 case basis.

3 In a request for stay relief, the moving party bears
4 the initial burden to demonstrate that good cause exists for
5 lifting the stay using the Sonnax factors, and the Court may
6 deny the motion if the movant fails to make an initial showing
7 of cause. See Sonnax 907 F.2d at 1285. Also, Capital
8 Commercial Federal Credit Union v. Boodrow, (In re Boodrow) 126
9 F.3d 43, 48 (2d Cir. 1997), ("We have emphasized that a
10 bankruptcy court should deny relief from stay if the movant
11 fails to make an initial showing of cause.") Internal
12 quotations omitted.

13 As the debtors argue in their objection, nearly all of
14 the Sonnax factors applied by courts in the Second Circuit
15 weigh in the debtors' favor against lifting the automatic stay.
16 The California action is in the early stages of litigation and,
17 indeed, counsel today has acknowledged that the federal court
18 action is likely to be dismissed and a new action filed in Los
19 Angeles Superior Court. That hasn't been filed yet.

20 No insurer has assumed responsibility for paying the
21 debtors' defense cost for the action and the case does not
22 involve third parties.

23 Overall, the balance of harms favors maintaining the
24 stay. The movants have not put forth evidence they will suffer
25 prejudice or severe harm if the stay is not immediately lifted,

1 and there's no evidence that GMAC initiated foreclosure
2 proceedings on the movant's property. In fact, it is not even
3 clear that the movants have a mortgage with GMAC.

4 The movants allege that GMAC is still engaging in
5 improper business practices and the movants and purported class
6 are continuing to be harmed by such action; however, the
7 government is now strictly regulating mortgage servicers, and
8 if the consent decree has not made GMAC improve its practices,
9 it does not seem likely that an injunction issued in the
10 movant's case would make any difference. On the other hand,
11 permitting this case to go forward would impose substantial
12 cost to the debtors and possibly its creditors.

13 Moreover, lifting the stay in this case might open the
14 floodgates to similar claims which would be contrary to the
15 prior lift stay decisions issued by this Court on similar
16 facts.

17 Should the movants wish to pursue claims for monetary
18 damages against the debtors, they can do so through the claims
19 allowance process. If they're going to seek injunctive relief
20 against the debtors, Rule 7001(7) permits an adversary
21 proceeding to be brought against the debtors to do so. The
22 Court makes no determination whether any consent order entered
23 into by the debtors will have any effect on what relief, if
24 any, can be granted in the event that any case is filed.

25 That will be the ruling of the Court. The debtors'

1 counsel should prepare an order reflecting that the motion to
2 lift the automatic stay is denied for the reasons stated on the
3 record.

4 MR. ROSENBAUM: Thank you, Your Honor.

5 MR. ROBERTS: Thank you, Your Honor.

6 THE COURT: Thank you.

7 MR. ROSENBAUM: Your Honor, the last matter on the
8 agenda and at page 10, it's number 2, this is Richard D. Rode's
9 motion to lift the stay. It was filed, I believe the same --
10 the same document was filed multiple times -- or three times,
11 excuse me, it's docket numbers 2153, 2154 and 2157. And I
12 believe Mr. Rode, and I apologize if I'm pronouncing his name
13 wrong, has made a telephonic appearance.

14 THE COURT: And, Mr. Rode, are you on the phone? Mr.
15 Rode, are you on the phone?

16 Mr. Rode had checked in. He's checked off on my phone
17 list from earlier. In light of the fact that Mr. Rode does not
18 appear to be on the phone at this time, I'm not going to hear
19 argument. I'll rule based on the papers. I've read all of the
20 papers.

21 Before the Court is the motion of Richard D. Rode to
22 lift the automatic stay with duplicative filings at 2153, 2154
23 and 2157. Debtors filed an objection. It's at 2682. And the
24 objection is supported by the declaration of Lauren Graham
25 Delehey. It's Exhibit 1 to the objection. And the motion to

1 lift the stay is denied.

2 On July 21, 2011, Mr. Rode filed a petition commencing
3 the inaction in the district court of 125th Judicial District
4 of Harris County, Texas. It's case number 2011-43161. By the
5 original petition, Mr. Rode sought unspecified damages, actual,
6 exemplary and attorneys' fees on account of various state law
7 causes of action related to the debtors' servicing of his
8 mortgage loan. It specifically includes breach of contract,
9 fraud in the inducement, fraud and negligent misrepresentation
10 in violation of the Texas Deceptive Trade Practices Act.
11 Defendants filed their answer to the original petition on
12 August 11th, 2011.

13 On February 6th, 2012, Mr. Rode filed a first amended
14 petition in which he asserted additional causes of action
15 against the defendants namely for conversion, breach of
16 fiduciary duty, common law and statutory fraud and accounting
17 in violations of Texas Finance Code and the Texas Theft
18 Liability Act. The Texas action was subsequently removed to
19 the federal district court on February 9, 2012. The debtors
20 filed their bankruptcy on May 14th of 2012.

21 The automatic stay affords one of the fundamental
22 debtor protections provided by the bankruptcy laws. See the
23 Supreme Court's decision in Midlantic National Bank, 474 U.S.
24 494, 503 (1986). The automatic stay maintains the status quo
25 and protects the debtors' ability to formulate a plan for the

1 sale or disposition of property of the estate. See Collier on
2 Bankruptcy, paragraph 362.03.

3 The automatic stay is intended to allow the bankruptcy
4 court to centralize all disputes concerning property of the
5 debtors' estates so that reorganization can proceed efficiently
6 unimpeded by uncoordinated proceedings in other arenas. See
7 SEC v. Brennan 230 F.3d 65, 71 (2d Cir. 2000). In this regard,
8 the automatic stay promotes equal treatment and gives debtors a
9 breathing spell.

10 In any motion to lift the stay under Section 362(d),
11 the Second Circuit has set out twelve nonexclusive factors for
12 courts to consider and it's in the Sonnax Industries case, 907
13 F.2d 1280, 1286 (2d Cir. 1990). Not all Sonnax factors are
14 relevant in every case and cause is a broad and flexible
15 concept and must be determined on a case-by-case basis. The
16 moving party bears the initial burden to demonstrate that cause
17 exists to lift the stay.

18 If the movant is an unsecured creditor, the policies
19 of the automatic stay weigh against granting the relief
20 requested. The general rule is that the claim -- claims that
21 are not viewed as secured in the context of 362(d)(1) should
22 not be granted relief from the stay unless extraordinary
23 circumstances are established to establish such relief -- to
24 justify such relief. See In re Leibowitz 147 B.R. 341, 345
25 (Bankr. S.D.N.Y. 1992). See also Lawrence v. Motors

1 Liquidation Co, (In re Motors Liquidation Co.) 2010 WL 4966018
2 at *4 (SDNY Nov. 17, 2010).

3 The Court initially observed that Mr. Rode has not
4 performed any analysis of the Sonnax factors and he has failed
5 to satisfy his burden of proof. However, even a cursory
6 analysis of most of the relevant Sonnax factors demonstrates
7 that the stay should not be lifted in this case.

8 The Texas action was at a very early stage.

9 MR. RODE: Your Honor?

10 THE COURT: Yes. Who's speaking?

11 MR. RODE: I apologize. This is Mr. Rode. I was
12 disconnected and I just got called back in.

13 THE COURT: Okay. Mr. Rode, when you weren't on the
14 phone when I called the case, I declined to permit the debtors'
15 counsel to argue either and I'm going through and making my
16 ruling on the record. There will be a transcript that will be
17 available. I'm not going to summar -- I don't know when you
18 came on the line -- I'm going through in some detail and the
19 basis for my ruling denying your motion to lift the stay. So
20 I'm not going to hear argument now. I'm going to go ahead and
21 continue with my ruling. If you missed the first part of it,
22 you'll have to get a copy of the transcript but --

23 MR. RODE: Your Honor, I was --

24 THE COURT: No. Stop. You were not disadvantaged.
25 I've read all the papers. If you were on the phone when the

1 Court -- when the case was called, I would have permitted you
2 to argue. Since you weren't there then, I'm not faulting you
3 for that. I know you had -- I did indicate on the record
4 earlier that you had checked in before the court hearing
5 started. You were not present on the phone when the case was
6 called. So based on the papers before me, I'm going ahead and
7 issuing my ruling. So you'll be able to get a transcript of
8 it. Let me continue on with my ruling.

9 As I indicated, the Texas action is at an early stage.
10 And so even if stay relief were granted, it would not be near a
11 conclusion in the Texas court.

12 The second Sonnax factor interferes with the
13 bankruptcy case, weighs in favor of denying the motion. In
14 addition to addressing day-to-day challenges, it is of the
15 utmost importance that the debtors devote their complete
16 efforts to the essential tasks necessary to achieve a
17 successful resolution of these cases, namely, maximizing the
18 value of their assets by working to achieve a timely closing of
19 the asset sales, consummating various settlements, complying in
20 full with the examiner's investigation, participating in the
21 mediation in order to facilitate the formulation of a Chapter
22 11 plan, and proceeding with Chapter 11 claims resolution
23 process.

24 In addition, upon the closing of the asset sales, a
25 number of the debtors' current employees, including personnel

1 and the debtors' legal department will become employees of
2 Ocwen. As a result, the debtors will be operating with reduced
3 staff, further constraining their ability at this juncture to
4 attend to matters that are neither urgent, operational issues
5 nor directly related to the debtors' restructuring.

6 At this juncture, granting stay relief would
7 undoubtedly invite countless other lift stay motions -- I've
8 already had numerous lift stay motions -- additional lift stay
9 motions from the debtors myriad other pre-petition claimants
10 opening the floodgates to litigation that would impose
11 significant burdens on the debtors and their estates and
12 depriving the debtors of the continued breathing spell which
13 the automatic stay provides.

14 The Bankruptcy Code provides for an orderly and
15 centralized claims process. And, Mr. Rode, if he's filed a
16 timely proof of claim will certainly have his claim considered
17 as part of the process if there are any objections to the
18 claim.

19 The seventh Sonnax factor where the litigation in
20 another forum would prejudice the interests of other creditors
21 also does not support relief because the interest of the
22 debtors or the creditors will be prejudiced if the automatic
23 stay is lifted to allow the Texas action to proceed against
24 debtors at this juncture in the Chapter 11 cases. Having to
25 defend such an action would deplete the estate resources,

1 thereby, prejudicing other creditors of greater significance.
2 Lifting the stay would also expose the debtors to have to
3 defend countless other lift stay motions. This would impose a
4 heavy burden on the valuable time and efforts of the debtors'
5 employees and retained professionals.

6 The tenth and eleventh Sonnax factors, judicial
7 economy and readiness for trial, respectively, both weigh in
8 favor of denying a relief from stay. As set forth above, the
9 Texas action is in its preliminary phases. It is not trial-
10 ready and few judicial resources have been expended in
11 resolving a Texas action.

12 The debtors' priority at this time is ensuring a
13 speedy and effective reorganization process which may be
14 hindered if they are forced to litigate this and other stayed
15 lawsuits during the pendency of these cases.

16 Thus, the interest of judicial economy and economical
17 resolution of litigation are best served by denying the relief
18 from stay.

19 The twelfth Sonnax factor, balance of harms, weighs in
20 favor of denying the motion. Mr. Rode has not demonstrated how
21 the continued suspension of the Texas action results in any
22 material prejudice to him. Even if Mr. Rode's claims are
23 meritorious, they will be accorded general unsecured creditor
24 status against the debtors' estates. And Mr. Rode will
25 experience no great benefit if awarded such claims sooner

1 rather than later. On the other hand, the cost to the debtors
2 of lifting the automatic stay at this stage of the Chapter 11
3 case is substantial.

4 And since the first motion seeking relief from stay
5 was filed, dozens of similar motions have been filed in this
6 case. The Court has issued many written opinions dealing with
7 similar lift stay motions and analyzing the Sonnax factors.

8 For the reasons summarized by the Court, the Sonnax
9 factors weigh heavily against granting Mr. Rode's motion to
10 lift the stay, therefore, the motion is denied for the reasons
11 stated on the record.

12 Mr. Rosenbaum, please prepare an appropriate order.

13 MR. ROSENBAUM: Will do so, Your Honor. Thank you.

14 Your Honor, I spoke too soon. We do need to address
15 the third matter on page 10 and Ms. Barrage will be handling
16 it.

17 THE COURT: Ms. Barrage, what is this one?

18 MS. BARRAGE: Your Honor, Alexandra Barrage, Morrison
19 & Foerster on behalf of the debtors.

20 This is V, item number 3 on page 10 of the agenda, ECF
21 docket number 2686. This is the debtors' first motion for
22 order under 105(a) and 365(a) on shortened notice to assume and
23 assign various executory contracts to Ocwen.

24 Your Honor, we received one objection to this motion.
25 That was an objection that was filed by CalHFA at docket number

1 2702 which is reflected on page 11 of the agenda.

2 Your Honor, I'm pleased to report that we have
3 resolved the concerns of CalHFA in terms of the cure amount and
4 the stipulation that will accompany that. A resolution is now
5 being negotiated between the debtors and CalHFA's counsel.

6 I'm also -- I'd also like to update the Court and
7 state that Ocwen has now, as of the filing of the objection,
8 has submitted an application to CalHFA for servicer approval.
9 So that process will run its course, and hopefully the
10 remaining cure amount -- or excuse me -- cure objection issues
11 will be resolved.

12 THE COURT: I read the papers. What took them so
13 long?

14 MS. BARRAGE: Your Honor, when you say "you" --

15 THE COURT: I didn't -- it wasn't you, I understand.
16 You know, Ocwen can't sit back and, if I -- am I remembering
17 correctly because I think that the California Housing Finance
18 Agency laid out at some length their efforts to get Ocwen off
19 the dime to do something. Okay. I understand there's a lot to
20 be done in this. This is -- you're the one who's standing up
21 there, I understand. It's not you who has -- is there a lawyer
22 for Ocwen here?

23 MS. BARRAGE: Yes, Your Honor.

24 THE COURT: Come on up.

25 MR. LESMAN: Good morning, Your Honor. Adam Lesman,

1 Clifford Chance on behalf of Ocwen Loan Servicing.

2 With respect to the timing delay, I don't have much to
3 report other than it had been a --

4 THE COURT: That you're completely asleep at the
5 switch and you wanted nothing to do with Cal --

6 MR. LESMAN: I think there were a lot --

7 THE COURT: -- Housing Finance.

8 MR. LESMAN: I'm sorry. I think there were a lot of
9 internal processes that we're still working through to get
10 ready to application which they did submit --

11 THE COURT: You could at least respond to them and
12 tell them what -- give them a status report.

13 So you choke up this Court's calendar to deal with
14 issues. I'm glad that Ms. Barrage indicates that there's been
15 a resolution not documented yet, but you frustrate the process
16 of this court in trying to expeditiously deal with this very
17 complex bankruptcy case.

18 MR. LESMAN: I apologize for the delay, Your Honor. I
19 know that they were working pretty hard to get the application
20 in prior to the hearing which the application was submitted and
21 approved -- I'm sorry -- it was submitted and is going through
22 the process and --

23 THE COURT: When was it -- when was it submitted?

24 MR. LESMAN: It was submitted yesterday, Your Honor.

25 THE COURT: Oh. Just in time for the hearing.

1 MR. LESMAN: Yes.

2 THE COURT: Well, that's progress, I suppose. Thank
3 you.

4 MR. LESMAN: Thank you, Your Honor.

5 MS. BARRAGE: All right. Your Honor, with --
6 Alexandra Barrage, Morrison & Foerster again on behalf of the
7 debtors.

8 We will be filing a revised form of order to reflect
9 some language that the California Housing Finance Authority
10 (sic) has requested.

11 THE COURT: Okay. Is anybody from California Housing
12 Finance Agency on the phone?

13 MR. PASCUZZI: Yes, Your Honor. Paul Pascuzzi,
14 Felderstein, Fitzgerald, Willoughby & Pascuzzi for California
15 Housing Finance Agency.

16 THE COURT: Thank you. Are you satisfied that you've
17 reached, subject to documentation, you've reached a resolution
18 with the debtor?

19 MR. PASCUZZI: Yes, Your Honor. And I appreciate the
20 Court's comments about the timing of the application and we'll
21 do our best to get it reviewed and approved as soon as
22 possible. I missed the February date that was reported earlier
23 about a target closing date, and I've been in contact with Ms.
24 Barrage about what will happen if we're not quite through with
25 the review process at their target closing date, but we'll keep

1 working on it, Your Honor.

2 THE COURT: Okay. Do the best you can. I appreciate
3 the efforts. Okay.

4 MS. BARRAGE: Thank you, Your Honor.

5 MR. PASCUZZI: Thank you.

6 THE COURT: Thank you.

7 MS. BARRAGE: And thank you, Mr. Pascuzzi. That's all
8 I have on this motion.

9 THE COURT: Thank you.

10 MS. BARRAGE: Thank you, Your Honor.

11 THE COURT: So are we going to --

12 MS. BARRAGE: We will -- Your Honor, we will --

13 THE COURT: Let's put it on the calendar for February
14 7th. Let's see where you are. Hopefully, it will be resolved.
15 If not, let me get a status on it. Okay?

16 MS. BARRAGE: That's fine with us, Your Honor.

17 THE COURT: Thank you very much.

18 MS. BARRAGE: Thank you.

19 THE COURT: Mr. Marinuzzi?

20 MR. MARINUZZI: Good afternoon, Your Honor. I think
21 that concludes our agenda for today. The only reason I rise is
22 to remind the Court that we were scheduled to be here later
23 this afternoon for a trial on the debtors' motion to make AIP
24 payments. We're happy to report that we've resolved the
25 objections of the official committee of unsecured creditors and

1 the United States Trustee's office and submitted earlier this
2 morning, just before the hearing, a form of agreed order. I
3 don't know if Your Honor's had a chance --

4 THE COURT: I've reviewed the order and it's
5 satisfactory with the Court and it will be entered.

6 MR. MARTINUZZI: Thank you, Your Honor.

7 THE COURT: Mr. Driscoll, the U.S. Trustee is
8 satisfied?

9 MR. DRISCOLL: Yes, Your Honor.

10 THE COURT: Thank you. It's Mr. Driscoll from the
11 U.S. Trustee's office in the back of the courtroom. Okay.

12 MR. MARINUZZI: That's all we have for today, Your
13 Honor. Thank you.

14 MR. CHENEY: Your Honor?

15 THE COURT: Yes.

16 MR. CHENEY: Your Honor, if I may. This is Kirk
17 Cheney, McKool Smith representing Freddie Mac.

18 THE COURT: Yes.

19 MR. CHENEY: I just want to -- we just want to make
20 one comment on the debtors' status report at the beginning
21 about that Ocwen platform sale.

22 THE COURT: Sure. Go ahead.

23 MR. CHENEY: The debtor is --

24 THE COURT: I'm sorry; just tell me your name one more
25 time.

1 MR. CHENEY: Kirk Cheney from McKool Smith.

2 THE COURT: Okay. Go ahead.

3 MR. CHENEY: The debtor reported that we had an
4 agreement in principle. We do agree with the debtor that we
5 are targeting a February 15th closing date and that internal
6 and conservator approval still need to be obtained. And we
7 expect and hope to reach that closing target. We just wanted
8 to note that we are still negotiating the appropriate cure
9 amount and the terms of the servicing transfer and when we do
10 arrive at an agreement we expect to file a stipulation order as
11 Freddie Mac -- as Fannie Mae has done. But we are still
12 negotiating on those terms.

13 THE COURT: Thank you very much.

14 MR. CHENEY: Yes.

15 THE COURT: All right. Mr. Marinuzzi, anything else?

16 MR. MARINUZZI: That's all if have, Your Honor.

17 THE COURT: All right. We're adjourned. Thank you
18 very much everybody.

19 IN UNISON: Thank you, Your Honor.

20 (Whereupon these proceedings were concluded at 12:17 PM)

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C E R T I F I C A T I O N

I, Sharona Shapiro, certify that the foregoing transcript is a true and accurate record of the proceedings.

Sharona Shapiro

SHARONA SHAPIRO

AAERT Certified Electronic Transcriber CET**D-492

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Date: January 30, 2013